

# **Procedures Relating to Compliance Activities**

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# Overview

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The principal objective of the manual is to set up a legally sound, effective and efficient system for the handling of complaints.

This manual is not intended or designed to be the complete and only reference material in the handling of complaints. Procedures will continue to evolve as a result of judicial decisions, and policy changes. For this reason, the manual will require the officers using it to continually assess its practicability and ensure its ongoing development. I understand that it will be regularly reviewed.

Representatives of the former Legal and Compliance developed and finalised these guidelines at the end of 2001. The redevelopment of the manual, in part, resulted from a view that we are now ready to review our practices as a result of over four years of experience. The manual has again been revisited in light of recent changes to procedures in the former Legal and Compliance section along with the merging of Compliance with the former Advice and Assistance Group. Representatives from the new Client Service Network, along with PRU and Legal have taken part in this further review.

## **The first 4 years**

During the first 4 years, we faced the demand of setting up a new organisation, administering new legislation in an environment of workplace relations reform.

We've been relatively successful in the legal and compliance area. We have certainly not completely eliminated coercive behaviour re union membership or enterprise agreements, but we have had a real impact in getting the parties to be more careful about how they behave.

As with all organisations, we need to learn continuously from our experience to make sure that we use our limited resources to best effect.

During this period it was very important to get some matters into Court for the purposes of testing the new legislation and to establish and promote the credibility of the OEA as being something more than "a toothless tiger". In this context, it was important to get some wins under our belt.

In doing this thorough and time intensive investigations and legal interventions have been necessary. Our efforts in testing legislation during this period have been beneficial and the process through which matters have been selected for testing in Court generally successful. The OEA has been successful in almost all of matters that have been taken to the Courts.

While this approach was the right one at the time, there has been a cost.

We've spent hundreds of thousands of dollars in legal fees, and huge amounts of our time, and while we've generally won we've tended to get only very small



penalties – and of course generally no costs. The court matters have also taken a long time from complaint to final decision (then sometimes going on to appeal). We know that most complainants want their matters dealt with expeditiously.

### **Approach now**

It is now time to re-emphasise the need for speedy resolution of complaints, especially through voluntary compliance. Voluntary Compliance is something that the Courts and the Australian Industrial Relations Commission expect of us.

Voluntary Compliance is consistent with the Minister's formal directions to inspectors and the role of Commonwealth agencies as model litigants.

Voluntary compliance is usually quicker than having a matter resolved in court.

We've always said that Voluntary Compliance is our preferred method of dealing with things so it is a matter of emphasis. We probably need to rethink what is really involved in Voluntary Compliance, which has, in the past taken a fairly legalistic approach.

The focus of our work should be assisting parties to a complaint to resolve the problem and getting an immediate change in behaviour. Our aim should be to resolve matters quickly; lengthy legal proceedings should only be initiated as a last resort. Where legal proceedings are used preference should be given, where practicable, to obtaining interlocutory relief.

The benefits of facilitating compliance with our legislative responsibilities as opposed to long protracted legal cases is reflected in the Executive's decision to merge the Compliance function with the Advice and Assistance function more closely.

In saying this it is important to note that the merging of the two sections is no way evidence of a "down grading" of our commitment to compliance activities. Rather it is an effective way of managing our limited resources. All staff in the CSN, with time and training, will be equipped with the skills to effectively handle complaints. CSN Officers at the OEA 5 level and above will be appointed as Authorised Officers and Inspectors under the Workplace Relations Act. The new structure will facilitate the movement of resources when the need for a focused and resource intensive investigation is identified. The quick collection of evidence by teams of CSN staff will facilitate the stopping of behaviour identified as breaching the Workplace Relations Act – either through agreeance by the offending party or through quick court applications such as the seeking of interlocutory injunctions. The focusing of resources in this manner has been recently tried and resulted in a quick and effective outcome for the complainant and the OEA. This ability of the OEA to act quickly and effectively in handling complaints will continue to be enhanced through participation in investigation and conflict resolution skills training by all CSN staff.

### **Practical implications**

Legal tools such as interlocutory injunctions to stop alleged unlawful behaviour are a powerful tool in ensuring compliance with the Act and should be actively considered during the planning for an investigation.

There will obviously need to be more emphasis on dispute resolution skills and practices and less emphasis on taking detailed statements. Detailed statements

can be replaced with detailed, signed file notes by officers which at a later date if needs be can be drafted into a more legalistic document. We will support staff in developing the skills to actively pursue the dispute resolution skills and practices to which I refer.

The services review that we completed last year shows the benefit of workplace visits, and we will need to keep an emphasis on both proactive and reactive visits.

We also need to continue to emphasise close teamwork within Legal and the Client Service Network.

**Jonathan Hamberger**

**Employment Advocate**

**2 April 2002**



# About this manual

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## Introduction

The first section of this manual provides an overview of the relevant provisions of the WRA and other material, which provide the legislative and policy framework for the work of the Client Services Network (CSN).

The second and third sections provide information on the powers of authorised officers and inspectors, and also how they carry out their functions and the standards expected of them. This includes the treatment of information obtained by OEA compliance staff, in terms of confidentiality and privacy.

The fourth section deals with what is meant by voluntary compliance, which is the focus of our work. While compliance and investigative work by its very nature requires the use of initiative and discretion, it is also essential that the procedures contained in this manual be followed. The recruitment and training conducted by the OEA is designed to ensure that the OEA has both experienced and skilled staff available to carry out the compliance work. At all times, officers must be able and prepared to account for their decisions and actions (supported by documentation).

The fifth and sixth sections deal with carrying out an investigation and taking matters on to litigation. The seventh section deals in particular with handling AWA matters. The eighth section deals with handling Code inspections.

The remaining sections deal with complaints made about OEA officers; procedures relating to field-based visits; and the media.

This procedures manual will be reviewed on a six-monthly basis. Comments and suggested improvements are always welcome, and should be referred to the CSN Manager North/ South.

## Version history

| Version number | Release date   | Description  |
|----------------|----------------|--|
| 1.0            | September 2001 | Manual substantially revised.<br>Online version published. |

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|   |          |  |
|---|----------|--|
| 2 | May 2002 | Manual revised by Ann Brimson, Trevor Hunter and David Rushton |
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# Chapter 1: Work scope

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## Mission and objectives

### *The OEA mission*

The mission of the OEA is to help employers and employees achieve better workplaces.

This is pursued through the facilitation of co-operative decision-making between parties in the workplace, rather than through large-scale centralised decision-making.

The overall goal is more flexible, fair and efficient workplaces.

### *Legislative framework*

The Workplace Relations Act 1996 (WRA) is the legislative framework which provides employers and employees with the flexibility to decide on the industrial arrangements most appropriate for them. It also provides employers and employees with the right to choose whether they wish to join an industrial association.

### *Compliance Objectives of Client Service Network*

A principal objective of the CSN is to ensure compliance with those provisions of the WRA which guarantee the following freedoms:

- the freedom to join or not join industrial associations, and
- the freedom of employers and employees to enter into their chosen form of industrial agreement free from coercion.

## Legislative and policy framework

### Legislation

These provisions of the WRA are most relevant to Client Service Network Officers:

| <b>Provision</b>      | <b>describes...</b>   |
|-----------------------|---|
| Part I, s 3           | principal objectives of the Act, including:<br>freedom to choose an industrial instrument<br>fair agreement making<br>freedom of association. |
| Part I, s 4           | definition of key terms.  |
| Part IVA, Division 1  | functions and powers of the Employment Advocate.  |
| Part IVA, Division 2  | provisions regarding Authorised Officers, and their powers under s 83BH.  |
| Part IVA, Division 4  | miscellaneous provisions, including non-disclosure of identity of parties to an AWA.  |
| Part V                | provisions regarding Inspectors, including their powers under s86(1).   |
| Part VIA, Division 3  | termination of employment provisions, particularly relating to an AWA under s 170CK(2)(g).  |
| Part VIB, Division 9  | s170NC provisions regarding prohibition of coercion in relation to certified agreements.  |
| Part VID              | provisions relating to AWAs.  |
| Part VIIIA            | provisions prohibiting payment of employees for periods of industrial action and related conduct.   |
| Part IX, Division 9   | provisions regarding membership of organisations, resignation and payment of arrears.   |
| Part IX, Division 11A | right of entry provisions and powers of officers/employees of organisations.  |
| Part XA               | Freedom of Association provisions which set out specific prohibited conduct and prohibited reasons.   |
| Part XI               | provisions regarding offences, including ss305 – 305A regarding hindering or obstructing Inspectors or Authorised Officers.                   |

Additionally, these Workplace Relations Regulations are specifically relevant to CSN Officers:

| Provision             | Describes...   |
|-----------------------|--|
| Part IIIA, Division 1 | Regulations relating to Authorised Officers.                 |
| Part IV               | Regulations relating to Inspectors.                          |
| Part 5C               | Regulations relating to AWAs.                                |
| Part 6B               | Regulations relating to Strike Pay.                          |
| Reg 109C              | Regulations relating to revocation of right of entry permit. |

Part 9A records to be maintained by employer, in particular Reg 131L and Reg 131M.

*Press Ctrl and left mouse click to view the full text of these provisions.*

[http://www.oea.gov.au/graphics.asp?showdoc=/home/helpful\\_links-legislation.asp&SubMenu=5&Page=1](http://www.oea.gov.au/graphics.asp?showdoc=/home/helpful_links-legislation.asp&SubMenu=5&Page=1)

### *National Code of Practice for the Construction Industry*

The OEA has responsibility for assisting the Code Monitoring Group and Commonwealth agencies with monitoring and promoting compliance with the industrial relations provisions of the National Code of Practice for the Construction Industry (the Code). CSN officers may conduct audits and investigations of alleged breaches of the Code.

The Code reflects best practice principles for the construction industry. The Commonwealth Government encourages the industry to embrace these principles by making adherence a mandatory requirement for all Commonwealth Government funded contracts and construction projects since 1 July 1997.

There is some overlap between the WRA and the Code, but the Code does not have legislative force - it relies on contractual obligations.

For information on the role of CSN Officers in monitoring the Code, refer to *Chapter 8: Code site inspections*.

### *Memoranda of Understanding with other agencies*

Currently, the OEA has a Memoranda of Understanding (MOU) with two agencies together with Memoranda with the WA and SA State Departments:

#### **Department of Employment and Workplace Relations (DEWR)**

The purpose of this MOU is to define responsibilities between the OEA and DEWR for delivery of services relating to:

- Provision of advice and assistance on the application of the WRA, federal awards and agreements, and related legislation.
- Compliance with and enforcement of relevant WRA provisions, federal awards and agreements.
- Enforcement of the industrial relations provisions of the Code.
- Education and enforcement activities.



The importance of the MOU is in allocating primary responsibilities for matters to either the OEA or the DEWR's Office of Workplace Services (OWS).

The allocated responsibilities of the OEA are:

- AWAs, including filing and approval requirements and initial enquiries about compliance with approved AWAs (Part VID)
- application of the provisions of the WRA relating to:
  - freedom of association (Part XA)
  - coercion and duress in agreement making (ss170NC and 170WG)
  - right of entry (Part IX, Division 11A)
  - strike pay (Part VIIIA)
  - the industrial relations provision of the Code.

The allocated responsibilities of the OWS are application of and compliance issues related to:

- federal awards and certified agreements
- Schedule 1A of the Act regarding Victorian employers and employees
- time and wage records and payslip requirements, except in relation to AWAs
- minimum entitlements under the WRA, e.g. termination provisions
- investigations of AWA breaches which have been referred.

The allocation of these responsibilities was based on the perceived expertise of each organisation when the MOU was signed. Because of this allocation, CSN officers are appointed as both Authorised Officers and Inspectors under the Act, as each can only exercise their powers in relation to specified matters.

*Press Ctrl and left mouse click to view the MOU.*

<http://fntan104/guidelines/owsGuide/index/sectionThree/default.asp#3.8%20Role%20of%20the%20Office%20of%20the%20Employment%20Advocate>

For more information on the specific powers of Authorised Officers and Inspectors, refer to **Chapter 2: Powers of Authorised Officers**.

### **Australian Competition and Consumer Commission (ACCC)**

The OEA has a Memorandum of Understanding (MOU) with the ACCC. The purpose of the MOU is to allow the flow of information between the two agencies on matters of mutual concern. This flow is subject to confidentiality considerations.

*Press Ctrl and left mouse click to view MOU located at bottom of page.*

[http://fntan104:81/graphics.asp?showdoc=/teams/legal\\_and\\_compliance/legal\\_and\\_compliance.asp&SubMenu=7](http://fntan104:81/graphics.asp?showdoc=/teams/legal_and_compliance/legal_and_compliance.asp&SubMenu=7)

## Directions

### *Ministerial directions for Inspectors*

Under s84(5) of the WRA, the Minister may issue directions to Inspectors by publishing a notice in the Gazette. These directions specify the way in which Inspectors are to carry out their functions.

Inspectors are required to comply with directions under s84 (6).

The Secretary of the DEWR, under Ministerial delegation, has issued directions on how Inspectors must exercise their power and perform their functions in relation to litigation:

- Such action should only be taken as a last resort. Every reasonable effort must be made to secure voluntary compliance.
- For offences under the Act, litigation can only be instigated with the approval of the relevant delegate.

*Press Ctrl and left mouse click to view Ministerial directions.*

<http://fintan104/guidelines/owsGuide/index/sectionFour/default.asp#4.3%20Ministerial%20Delegations%20and%20Directions>

### *Employment Advocate directions for Authorised Officers*

Under s83BG(2) of the WRA, the EA may issue directions to Authorised Officers. There are directions to OWS officers appointed Authorised Officers.



# Chapter 2: Powers of Authorised Officers and Inspectors

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## General description of powers

In certain circumstances, CSN Officers may exercise powers as Authorised Officers or Inspectors.

When exercising powers as Authorised Officers or Inspectors, you may:

- enter premises
- obtain documents or other things
- interview persons, but not compel answers.

Before using these powers, you must, unless impracticable to do so, consult with your Regional Manager.

## Types of investigations

CSN Officers at level 5 and above, are appointed as both Authorised Officers and Inspectors.

CSN Officers at the 4 level will assist Authorised Officers and Inspectors carry out their functions. This assistance may include accompanying on worksite visits, drafting statements and so on.

Whether you will exercise your powers as an Authorised Officer or as an Inspector depends on the type of investigation undertaken.

## *Breaches of Part VID or Part XA*

Authorised Officers may investigate breaches of these parts of the WRA:

- Part VID. These provisions relate to AWAs.
- Part XA. These provisions relate to freedom of association.

Authorised Officers are appointed under s83BG of the WRA. Their powers are specified under s83BH. Authorised Officers are responsible to the Employment Advocate and must comply with any directions from the Employment Advocate.

### *Other breaches of the WRA*

OEA officers appointed as inspectors may investigate breaches of these parts of the WRA:

- s170NC. This provision relates to coercion in agreement making.
- Part IX, Division 11A. These provisions relate to right of entry.
- Part VIIIA. These provisions relate to strike pay.

Inspectors are appointed under s84(2) of the WRA. Their powers are specified under s86(1). Inspectors are responsible to the Secretary of the DEWR or the Secretary's delegate, and must comply with any directions from the Minister, or the Minister's delegate.

### *Breaches of the Code of Practice for the Construction Industry*

If you are investigating a breach of the Code of Practice for the Construction Industry, you cannot use either Authorised Officer or Inspector powers.

In these investigations, you are carrying out a request of the Code Monitoring Group (CMG). The CMG is an inter-departmental body with overall responsibility for the Code. A representative of DEWR chairs the CMG.

For detailed procedures on Code investigations, refer to *Chapter 8: Code site inspections*.

## Powers of Authorised Officers

Authorised Officers are appointed by the Employment Advocate.

The powers of an Authorised Officer must be exercised in accordance with the WRA and this manual.

You should familiarise yourself with these sections of the WRA:

- s83BG, which covers the appointment of Authorised Officers, and
- s83BH, which sets out the powers of Authorised Officers.

### *Purposes for which powers may be used*

Under s83BH(1), Authorised Officers may exercise their powers to determine whether:

- the terms of an AWA have been or are being complied with, or
- the provisions of Part VID and XA have been or are being complied with.

Under s83BH(2), these powers may be exercised:

- during ordinary work hours, or
- at other times if necessary to achieve the purpose.

### *Reasons for entering premises*

Under s83BH(3) as an Authorised Officer, you may enter a place of business, without force, if you have reasonable cause to believe that:

- work is being or has been performed under an AWA, or
- there are documents relevant to one of the purposes set out in s83BH(1), or
- a breach of either Part XA or Part VID is occurring, has occurred, or is likely to occur.

In addition, under the provisions of sub-section 83BH(7A)(7B) and (7C), as an Authorised Officer, you may enter a place of business, without force, if:

- you have reasonable cause to believe that a person has information relevant for the purposes set out in s83BH(1), and
- the person ordinarily performs work or conducts business in that place of business.

You must not enter that place if you have reasonable cause to believe that the person concerned is not in that place.

For information about the interpretation and application of “reasonable cause to believe”, refer to *Notes on “reasonable cause to believe” Chapter 2*.

### *Method of entering premises*

Section 83BH(8) determines how a place of business should be entered if you intend to exercise the powers of an Authorised Officer.

Before entering the premises:

1. Verbally announce that you are authorised to enter the premises. You must do this before entering the front door, or while you are in a reception area.
2. Produce your identity card to the occupier (or representative of the occupier) for inspection.

If you have already entered the premises by invitation, and **then** decide to exercise Authorised Officer powers, you must:

- (a) Leave the premises.
- (b) Follow steps 1 and 2 described above before re-entering.

### *Actions that may be taken after entering premises*

As an Authorised Officer, if you enter premises under s83BH(3), you can:

- inspect any work, material, machinery, appliance, article or facility, or
- as prescribed by the regulations, take samples of any goods or substances, or
- interview any person, but not compel answers, or
- require the production of a document within a “specified period”. (The provisions of s83BH(4)(d) apply).

Note that the “specified period” is not prescribed by the WRA, but must be reasonable for the volume and location of the documents. For example, the specified period should not be “forthwith”, but a short period of three hours might be appropriate.

For detailed procedures on requiring documents, click [here](#).

Where a document is obtained the Compliance Officer should provide the person with a receipt. Click [here](#) to see an example of a receipt.

If you enter premises under sub-sections 83BH(7A), (7B) or (7C) you may only interview the person concerned. In these circumstances, an Authorised Officer has no power to require the production of documents.

In particular, in relation to premises which have displayed “No ticket no start” signs, Authorised officers should not try to take down these signs. Authorised officers may, however, photograph such signs, and request that the occupier take them down as they may encourage a breach of the WRA.

### *When to obtain approval to use powers*

In any circumstance where you anticipate confrontation and controversy, you must obtain prior approval from the CSN Manager North/South before using the powers of an Authorised Officer. The situation will be assessed in consultation with the Regional Manager.

You must obtain approval of the Deputy Employment Advocate, CSN, before using Authorised Officer powers at a solicitor’s offices or at union offices.

## **Powers of Inspectors**

Inspectors are appointed by the Minister.

The powers of an Inspector must be exercised in accordance with the WRA and this manual.

You should familiarise yourself with sections 84, 85 and 86 of the WRA.

### *Purposes for which powers may be used*

Inspectors may exercise their powers to determine whether:

- awards, or
- certified agreements, or
- the requirements of the WRA

are being or have been observed.

These powers may be exercised:

- during ordinary work hours, or
- at other times if necessary to achieve the purpose.

Note:

Normally the Office of Workplace Services (OWS) would investigate award and certified agreement matters.

Under Regulation 9(5), Inspectors do not have any powers regarding breaches of Parts IVA, VID or XA of the WRA.

### *Reasons for entering premises*

As an Inspector, if you have reasonable cause to believe that:

- work is being performed or has been performed in premises under an award or certified agreement, you may enter those premises or
- there are documents at a place of business relevant to one of the purposes described in Purposes for which powers may be used, you may enter that place of business.

You must produce your identity card to the occupier if requested.

For information about the interpretation and application of “reasonable cause to believe”, refer to *Notes on “reasonable cause to believe”*, **Chapter 2**.

### *Actions that may be taken after entering premises*

If you enter premises or a place of business as an Inspector, you can:

- inspect any work, material, machinery, appliance, article or facility, or
- as prescribed by the regulations, take samples of any goods or substances.  
You must first inform the owner or person in charge, or their representative, of your intention to do so, or
- interview any employee, but not compel answers, or
- require the production of a document within a specified period.

The provisions of s86(1)(b) apply.

Note that the specified period is not prescribed by the WRA, but must be reasonable for the volume and location of the documents. For example, the specified period should not be “forthwith”, but a short period of three hours might be appropriate.

For detailed procedures on requiring documents, click [here](#).



### *When to obtain approval to use powers*

In any circumstance where you anticipate confrontation and controversy, you must obtain prior approval from the CSN Manager North / South before using the powers of an Inspector. The situation will be assessed in consultation with the Regional Manager.

You must obtain approval of the Deputy Employment Advocate, CSN, before using Inspector powers at a solicitor's offices or at union offices.

## Use of powers after commencement of proceedings

### *Legal advice*

The OEA has obtained legal advice on the limitation of the powers of Authorised Officers and Inspectors.

This advice concludes that the investigative powers of Authorised Officers and Inspectors are not exhausted upon the commencement of proceedings by the Employment Advocate or an Inspector. Authorised Officers and Inspectors may still use their powers after proceedings have commenced.

However, there is an important limitation on the use of these powers.

Use of these powers may constitute a contempt of Court if such use confers an advantage not available under the normal processes of the Court. This means that Authorised Officers and Inspectors can seek the production of documents from third parties for use in proceedings after the proceedings have commenced provided such production would be available under the ordinary processes of the Court.

### *Policy*

OEA policy is that after commencement of proceedings, you must obtain express approval of the Senior Legal Manager before exercising powers under s83BH or s86.

Approval may be granted after considering:

- the rules of the particular Court in which proceedings have been commenced, and
- the reasons why you are seeking to use either s83BH or s86 powers instead of any mechanism available under the rules of the relevant Court, and
- whether the use of the s83BH or s86 powers will provide some advantage not available under the rules of the relevant Court.

Particular attention must be given to these issues in those matters where quick injunctive relief is being sought.

## Offence provisions

### *Relevant WRA offence provisions*

| Section of the WRA | Offence   |
|--------------------|---|
| Section 304        | False representation of oneself as an Inspector.  |
| Section 304A       | False representation of oneself as an Authorised Officer.   |
| Section 305        | Hindering or obstructing an Inspector.<br>Contravening an Inspector's requirement without reasonable excuse.<br>Knowingly making a false or misleading statement to an Inspector.   |
| Section 305A       | Hindering or obstructing a person known to be an Authorised Officer.<br>Contravening an Authorised Officer's requirement without reasonable excuse.<br>Knowingly making a false or misleading statement to an Authorised Officer. |

### *What to do if hindered or obstructed*

When exercising powers as an Authorised Officer or Inspector, you may be hindered or obstructed. Examples of this include being denied access to a workplace or denied access to documents.

To resolve such a situation, escalate the issue as follows:

1. Advise the person who is hindering or obstructing of your authority and powers under the WRA.
2. If access is still denied, explain that it is an offence to obstruct an Inspector or Authorised Officer and that penalties apply. The provisions of Sections 305, 305A and Regulations 131L and 131M apply.
3. If access is still denied, advise the person that they are in breach of the WRA and can be prosecuted, then leave the premises. Report the matter immediately to your Regional Manager.
4. The Regional Manager may attempt to seek voluntary compliance.
5. If access is still denied, refer the matter to the CSN Manager, North/ South for a decision on the appropriate action.

## Notes on “reasonable cause to believe”

When Sections 83BH and 86 of the WRA provide Authorised Officers and Inspectors with the powers to take actions where they have a “reasonable cause to believe,” certain circumstances exist.

Advice on the meaning and application of “reasonable cause to believe” has been provided by an OEA Legal Officer, and the OEA is acting on that advice.

The advice concludes that “a reasonable cause to believe” appears to require that:

- there is a reasonable cause or causes, and
- the particular Authorised Officer or Inspector has an actual belief based upon such reasonable cause or causes.

“Belief” has been interpreted as a degree of satisfaction that is more than suspicion but less than knowledge.

You must address the requirements of “a reasonable cause to believe” when seeking to exercise powers as an Authorised Officer or Inspector.

You need to identify the compliance purpose or provision of the WRA which applies to the issue you want to investigate.

- If you are seeking to act as an Authorised Officer:
  - Identify the provision of the WRA you are relying upon to enter premises.
  - If you are relying on s83BH(3)(c), identify the place of business, the breach of Part VID or XA, and whether the belief is that the breach has occurred, is occurring or is likely to occur.
  - If you are relying on s83BH(7A), identify the place of business, the place where the person ordinarily performs work or conducts business, and the information which the person is said to possess which is relevant to the compliance purpose.
- If you are seeking to act as an Inspector:
  - Identify the provision of the WRA you are relying upon to enter premises.

If you are relying on s86(1)(a)(ii), identify the place of business and the basis of your belief that there are documents relevant to ascertaining whether the requirements of the Act have been observed.

# Chapter 3: Responsibilities of Authorised Officers and Inspectors

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## Professional standards

Professional standards, which apply to the work of CSN Officers, include:

- standards of official conduct applicable across the public sector
- standards which are specifically applicable to work by OEA investigators in the field.

Additionally, all OEA officers carry a special responsibility to adhere to OEA Values and the OEA's Code of Conduct. *Press Ctrl and left mouse click to view.*  
[http://fmtan104:81/graphics.asp?showdoc=/corporate\\_info/policies\\_and\\_strategies/policies\\_and\\_strategies.asp&SubMenu=2](http://fmtan104:81/graphics.asp?showdoc=/corporate_info/policies_and_strategies/policies_and_strategies.asp&SubMenu=2)

High standards of performance in the conduct of investigations, reporting and initiation of court proceedings are all part of relevant professional standards.

## Public sector standards

Standards of official conduct for the public sector are set out in Regulations 8A and 8B of the Public Service Act 1922.

In summary, an officer should:

- perform their duties with skill, care, diligence, impartiality and to the best of their ability,
- comply with any enactments, regulations, determinations, awards or departmental instructions applicable to the performance of their duties and with any lawful and reasonable direction given by a person in authority,
- have regard to any official guidelines or recommendations applicable to the performance of their duties,
- treat members of the public and other officers with courtesy and sensitivity to their rights, duties and aspirations,
- provide reasonable assistance to members of the public and help them to understand their entitlements and any requirements with which they are obliged to comply,
- avoid waste, or extravagance in the use of public resources,
- not take improper advantage of any official information acquired, or any document to which they have access,
- at all times behave in a manner that maintains or enhances the reputation of the Australian Public Service (APS), and

- where an officer has an interest, pecuniary or otherwise, that could conflict with the proper performance of their duties, disclose that interest to their supervisor and take whatever action is required to avoid that conflict.

### *Specific standards for CSN officers when working in the field*

The standards of professional conduct listed here support the OEA's aim of creating better workplaces.

OEA officers should:

- assist people who have industrial relations issues in their workplaces to find solutions that comply with the requirements of the WRA.
- not impose their personal viewpoint in any given situation. Instead:
  - leave business decisions to people in business
  - provide advice on the application of the WRA including ways in which matters may be resolved by voluntary compliance or by initiating court proceedings
  - if appropriate, gather evidence in relation to alleged breaches of the WRA.
- maintain a balanced and impartial position. Parties who are in a situation of dispute are treated as having equal standing.
- avoid precipitating or escalating conflict in the field by:
  - focussing on advice and assistance
  - not attempting to “rush in” to resolve conflict.

In some situations, OEA presence may help defuse confrontation or volatile situations. Where it becomes apparent that OEA presence is inflaming a situation or presenting danger to any person (including yourself) the CSN Officer should withdraw and pursue other avenues of resolving the matter, e.g. writing to the party/s or follow-up visits.

- remain responsive to the situations we encounter and to the time frames relevant to the complaint under investigation.
- use good judgement to balance such considerations as awareness of the timeframe relevant to the complaint and the needs of persons with OEA procedural requirements.

## Privacy requirements

### *Disclosure of identity*

#### **General principle of confidentiality**

The identity of a complainant must be kept confidential unless the complainant provides express permission for their identity to be disclosed. This principle also applies to witnesses.

#### **Complainants: permission for identity to be disclosed:**

**For non – AWA related matters**, express oral permission must be given by the complainant before the OEA can release the identity of a complainant.

This oral agreement must be confirmed in a letter from the OEA and documented on COMS. The wording of the letter could be “I confirm your advice that you allow the OEA, if necessary in the course of the investigation, to release your identity.”

In saying this if an officer assesses, on speaking to a complainant or determines that written advice is warranted, then this should be requested from the Complainant within a specific time frame and actively followed up if no contact is made during that period.

**For all AWA complaints** formal written advice must be provided by the Complainant before any action is taken on the matter unless there is a compelling reason not to. A compelling reason may be that, because of the geographic isolation of the complainant, it is not reasonable to request written advice. If written consent cannot be provided, you should seek advice from the CSN Manager North / South.

In considering the compelling reason you should be particularly aware of the confidentiality provisions in s83BS concerning revealing the identity of the parties to an AWA, i.e. with certain exceptions it is an offence to disclose the identity of parties to an AWA. *Press Ctrl and left mouse click to view WRA*

[http://www.oea.gov.au/graphics.asp?showdoc=/home/helpful\\_links-legislation.asp&SubMenu=5&Page=1](http://www.oea.gov.au/graphics.asp?showdoc=/home/helpful_links-legislation.asp&SubMenu=5&Page=1)

Please note that in line with the threshold test in the procedures manual, if permission for identity to be disclosed is not given, regard should be had to whether or not the investigation should progress.

#### **Advice to complainants regarding confidentiality**

You should ensure that early in any investigation, complainants are advised that:

- every effort will be made not to reveal their identity. However, there can be no absolute guarantee that the general nature of the information sought or questions asked during the investigation will not identify a specific person.
- non-disclosure of their identity may make it impractical to investigate the matter or may prejudice the likelihood of a successful investigation.

It may not be possible for you to adequately investigate cases from complainants who wish to remain anonymous. In these circumstances, you should advise the complainant that you will need to reveal their identity if they want to pursue the

matter. You should obtain a written authority from the complainant authorising the disclosure of their identity.

**Witnesses: permission for identity to be disclosed:**

When a potential witness is first contacted for information they should be advised that the information provided and the identity of that person will not be released to parties external to the OEA without the express approval of the witness. This approval may be given orally or in writing. If the conversation is face to face then written approval should be obtained. This approval should be immediately recorded in COMS.

If permission to release identity and information is not given, regard should be given as to whether the information obtained from the witness (if any) should be used in assessing the substance of a complaint.

**Potential exceptions to the principle of confidentiality**

The only exception, where the identity of a complainant may be disclosed, is if there is a legal requirement to do so. Examples of such requirements are:

- requirements under another Act e.g. tax or social security legislation.
- a subpoena or summons from a Court. However, in these cases there may be grounds for a claim of public interest privilege.
- where it is reasonably necessary for the enforcement of the Criminal Law.

You must refer any case where the disclosure of the identity of a complainant may occur to the CSN Manager, North/South.

Where a matter is under investigation, you must not comment on the case to anyone external to the OEA (or DEWR, if applicable) except in the context of formally handling the case.

### *Legislative requirements*

The two main pieces of legislation which govern handling of personal information are:

- Privacy Act 1988 (the Privacy Act)
- Freedom of Information Act 1982 (FOI Act).

### *Provisions of the Privacy Act*

The provisions of the Privacy Act:

- generally restrict the use of personal information to the purposes for which it was collected
- prohibits the disclosure of personal information, subject to a limited number of exemptions.

**What is "personal information"?**

For the purposes of the Privacy Act "personal information" means information or an opinion, whether true or not, about an individual who can be identified from the details or the context of the information. Personal information can include photographs. It should be noted, however, that a business is not a

person. Therefore, information such as the name of a person on the signature block of a company document is not personal information.

### **What if an individual has a complaint?**

Individuals may complain to the Privacy Commissioner if they believe their privacy has been interfered with by a Commonwealth agency.

The Privacy Commissioner has broad powers to obtain information, examine witnesses and compel attendance at compulsory conferences.

Once a matter has been investigated, the Privacy Commissioner may make various determinations including that the individual concerned be paid compensation. The Privacy Commissioner's determinations can be enforced by order of the Federal Court.

If a Privacy Act complaint is received, you should refer it to the OEA Privacy Officer and the Legal Section.

### *Provisions of the Freedom of Information Act*

The FOI Act creates a general right of access to documents in the possession of an agency.

There are various exemptions to the provisions of the FOI Act.

If an FOI application is received, you should refer it to the OEA FOI Officer and the Legal Section.

### *Guidelines for collecting and storing personal information*

When collecting personal information from a client, you should inform the client of:

- the purpose for which the information is being collected
- the legal authorisation or powers which permit or require you to collect the information
- any person or body to which the information may be disclosed.

If you inform the client verbally, you should make a record that this has been done. Alternatively, the client may be informed in correspondence.

You must also take all reasonable action to ensure that records are secured against loss, misuse and unauthorised access, modification or disclosure.

### *Exceptions to general privacy principles*

**It is a fundamental principle of the Privacy Act that personal information may only be used for the purposes for which it was collected.**

You can get general advice about the operation of exemptions in the Plain English Guidelines to Information Privacy Principles 8-11. These guidelines are published by the Privacy Commissioner. For information on the guidelines, press Ctrl and left mouse click on the following.

<http://www.privacy.gov.au/government/officers/index.html>

You can get specific advice about the operation of exemptions in a particular case from the Legal Section.



### *OEA disclosure policy*

The OEA disclosure policy sets out the circumstances in which the OEA:

- may disclose information
- must disclose information
- must not disclose information.

Click [here](#) to view the OEA disclosure policy.

You must submit any requests for disclosure of information to the EA via the Senior Legal Manager

### *Categories of information*

Information can be categorised according to how it was obtained. This categorisation then impacts on whether information should be disclosed or not.

The categories are:

- non-confidential information
- confidential/private information
- statutory power information
- protected information.

#### **Non-confidential information**

Non-confidential information is:

- information obtained without the use of statutory powers and which is not confidential and is not s83BS material, or
- is not "personal information" as defined in the Privacy Act.

For example, non-confidential information can be information obtained as a consequence of an investigation of alleged breaches of the National Code of Practice for the Construction Industry. This can include information obtained where the tender documents and/or the contract between the client and the head contractor include a provision allowing for disclosure of material relating to compliance with the Code.

#### **Confidential/private information**

Confidential/private information is obtained:

- without the use of statutory powers, but is confidential in nature, or
- is "personal information" as defined in the Privacy Act.

The information may be confidential, if:

- it is confidential in fact, and
- the OEA has received it in circumstances permitting its use or disclosure for limited purposes only.

Information cannot be classified as confidential if it is in the public domain. It must be significant in the sense that the preservation of its confidentiality or secrecy is of substantial concern.

**Statutory power information**

This is information obtained using statutory powers available under the WRA.

**Protected information**

This is information as defined by s.83BS of the WRA.

***Voluntary disclosure of information***

Different guidelines for voluntary disclosure are applied to each of the four categories of information.

In all cases, you must obtain authorisation from the EA before disclosing information. Additionally, issues of procedural fairness must be considered before disclosing information. For example, all affected parties are to be given an opportunity to be heard.

**Non-confidential information**

Non-confidential information may be disclosed in the course of official duties in accordance with OEA disclosure policy.

**Confidential/private information**

Confidential/private information may be disclosed in the course of official duties in accordance with OEA disclosure policy and subject to the requirements of the Privacy Act and/or principles of confidentiality.

Where information is subject to the Privacy Act, disclosure would be permissible if:

- the person the information is about consents, or
- the use or disclosure is necessary to protect against a serious and imminent threat to a person's life or health, or
- the use or disclosure is required by law, or
- the use or disclosure is reasonably necessary to enforce the criminal law or a law imposing a pecuniary penalty or to protect the public revenue.

**Statutory power information**

Statutory power information may only be used for the purpose for which it was obtained.

As such, statutory power information may only be disclosed to other agencies in limited circumstances. An example of such a circumstance is where you need to disclose information to another agency in order to obtain information from that agency and the information obtained from the other agency is required to progress the OEA investigation.

**Protected information**

Protected information may only be disclosed in accordance with the provisions of the WRA.

### *Compulsory disclosure of information*

An Act of Parliament or a Federal or State agency may seek to compel the EA to provide information according to some compulsory process.

The EA is required to produce information in these circumstances subject to:

- the compulsory process having a valid legal basis, and
- any claim of privilege.

For example, compulsory disclosure may be required under s.316(1) of the Crimes Act (NSW), the FOI Act, or by a Senate Committee.

### *Disclosure of information for third party legal proceedings*

You may only give evidence or provide a statement for third party legal proceedings as a response to a subpoena, unless the EA authorises otherwise.

## Chapter 4: Voluntary compliance

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### What is voluntary compliance?

Voluntary compliance means achieving change in behaviour which results in compliance, while avoiding the instigation or continuation of legal proceedings.

Typically, the potential respondent offers and commits to undertake appropriate measures to rectify existing breaches and to prevent them from happening again.

Voluntary compliance may be achieved by informal or formal means.

Informal means include undertakings being given to the OEA. Examples of undertakings are:

- agreeing to enter an educational program, including talks from the OEA
- reinstating an employee
- agreeing to compensation.
- agreeing to stop a specific behaviour

Formal means occur after legal proceedings have commenced, and are undertakings given to the Court.

Note that in seeking voluntary compliance, the main aim is the protection of complainants. This means that the amount of compensation or penalty imposed may be of less importance than if voluntary compliance is not achieved.

### Reasons for seeking voluntary compliance

The Employment Advocate has stated that in most circumstances, voluntary compliance without resort to litigation is the most appropriate method of resolving the issues that come under the jurisdiction of the OEA.

The OEA welcomes voluntary compliance offers from the party that has committed the breach.

Breaches investigated by OEA compliance officers are often found to be inadvertent. In these cases, voluntary compliance can usually deliver a quick and satisfactory resolution.

Voluntary compliance produces a good outcome for employers and employees. Legal action is always adversarial, can be protracted and expensive and may produce a second rate outcome. Legal action may result in an irretrievable breakdown in ongoing relationships, such as work relationships. Voluntary

relationship facilitates the maintenance of an ongoing relationship through settlement that is agreed upon by the parties to a complaint.

Seeking voluntary compliance is a key element of the directions of:

- the Employment Advocate to Authorised Officers, and
- the Minister/Secretary to Inspectors.

## Methods of achieving voluntary compliance

Voluntary compliance is sought at every stage of an investigation. The following process shall apply:

1. Investigating each formal complaint that falls within the “criteria used to determine whether to proceed” and attempting to resolve by voluntary compliance where possible and as early as possible. This objective should be incorporated in every investigation plan.
2. Regardless of whether the issue is resolved, submit a recommendation to your manager who may refer to the Legal section, if necessary.
3. If voluntary compliance:
  - has been achieved, the CSN Officer will draft final letters and/or undertakings to the parties (with the assistance of the Legal Section if necessary). The Regional Manager will approve such letters and undertakings in accordance with the OEA’s correspondence policy.
  - has not been achieved, make a recommendation to your manager as to how to progress the matter. This would include consideration of legal action—advice should be sought from the Legal Section on this issue. This may lead to the Legal Section seeking voluntary compliance in conjunction with the CSN Officer.
4. If legal proceedings are commenced, Legal Section will, in conjunction with the CSN Officer, attempt to seek voluntary compliance prior to the matter being heard by a court or tribunal.

## Monitoring voluntary compliance

To facilitate monitoring of voluntary compliance, it is important that undertakings where given are expressed in specific rather than general terms.

CSN Officers should encourage complainants whose matters have been resolved by voluntary compliance to continue to liaise with the OEA to ensure that undertakings are being upheld.

Where the respondent has agreed to voluntary compliance, it may be necessary to monitor that the undertakings are being complied with. For example, the undertakings may require that an employer’s documentation (induction form, contracts, tenders, etc.) be amended, deleted or altered to ensure compliance with the provisions that offend FOA provisions of the WRA. Another example would be that the undertakings require the employer to conduct educative programs for staff concerning s170NC or FOA.

# Chapter 5: Investigation and case management

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## Determining whether to proceed with an investigation

### *What constitutes a complaint?*

Section 83BB of the *Workplace Relations Act 1996* sets out the functions of the Employment Advocate. In summary, the Employment Advocate has functions which include investigating:

- alleged breaches of AWAs
- alleged contraventions of Part VID and any other complaints relating to AWAs
- contraventions of Part XA.

The WRA does not refer to complaints as such and, accordingly, is silent as to the format of complaints (for example, some pieces of legislation require that a complaint should be in writing or lodged through a specific complaint-handling form).

The WRA is also silent as to how investigations should be carried out. In saying this, regard is to be had to the Commonwealth Model Litigant Policy along with the Secretary's formal direction to Inspectors regarding voluntary compliance. Regard also is to be had to legal principles of natural justice and procedural fairness.

The Commonwealth Model Litigant Policy requires that the Commonwealth and its agencies must behave as a model litigant in the conduct of litigation, in both responding to claims and initiating litigation. The policy is more fully described in the Attorney-General's Legal Services Directions. The main points to consider in respect of the OEA's role in initiating litigation is that the Commonwealth and its agencies act honestly and fairly in handling litigation brought by the Commonwealth or an agency by:

- acting consistently in the handling of litigation,
- endeavouring to avoid litigation, wherever possible,
- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum,
- not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest, and

The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.

The CSN does not require a written complaint. Complaints can be made verbally or through other means, e.g. telephone, email, facsimile. Before a complaint is registered, clear allegations that suggest a breach of the WRA must be made by or elicited from the complainant. The assistance provided to a complainant in making a complaint will be affected by a number of issues which are discussed below.

### *Natural justice and procedural fairness*

The rules of natural justice, or procedural fairness, are principles developed primarily to ensure that fair decision-making procedures are followed by administrators. The OEA is required to follow the principles of procedural fairness. One of the duties that the OEA is required to follow is the duty to act fairly.

### *Procedural fairness in complaint handling*

In line with this principle it is crucial that information is sought and received regarding the allegations contained in the complaint.

Any advice, including advice received through phone calls or in writing, which exhibits a sense of grievance which may fall under the jurisdiction of the WRA, should be considered in general terms as a complaint. However the complaint is not to be automatically actioned by the OEA at that stage.

Where the intention of the complainant is unclear or the basis of the alleged breach is unclear, further information should be sought from the complainant.

It is only when a clear intention to complain and clear advice regarding the allegation is received, that the matter should be registered as an investigation. This is not to say that the OEA could not provide general advice/offer appropriate referral to the complainant without such a clear intention or clear advice.

### *Is the complaint within jurisdiction?*

There are threshold jurisdictional issues that need to be satisfied before a complaint is investigated:

- The complaint must allege that a person or organisation has breached the Act. In saying this, it is important that a specific amount of threshold information is obtained before a potential respondent is contacted.
- Where it appears that a complaint does not express a grievance which can be readily classified as falling within jurisdiction, an opportunity should be given to the complainant to clarify what it is they are alleging.
- A complainant's ability to provide this information will vary for a number of factors. Clearly, the information that would be available from a professional representative would be different from that obtained by a person who may have a special disadvantage, which could include having English as a second language, a physical, psychiatric or intellectual disability, low literacy skills,

etc. The method through which further information is received will depend on the particular complainant.

- If no further classification of the allegations can be obtained, a recommendation as to whether further action should be taken is to be then made by the CSN officer or legal officer involved.

Clearly, within the principle of procedural fairness is an obligation for us to have a basis to act. Without some level of clearly defined allegations, the issue should not be raised with the potential respondent.

### *Ultra vires*

Administrative action, which is beyond the statutory powers of decision makers, is ultra vires and hence invalid. Ultra vires means that the decision maker has engaged in an abuse of power. An officer may be acting ultra vires if that person:

- acts for a wrong purpose, or
- takes into account irrelevant considerations, or
- fails to take into account relevant considerations, or
- acts unreasonably, or
- acts on the basis of no evidence.

It is at least arguable that actioning of matters where allegations have not been properly made out may be ultra vires and may result in an actionable claim by a respondent.

### *Criteria used to determine whether to proceed*

There is no actual or implied legislative provision that requires the OEA to deal with all complaints that are received. Clearly there is a discretion not to inquire into a complaint. The exercise of this discretion should be considered by the officer assessing the complaint, in consultation with their manager.

Because the resources of the OEA are limited, criteria must be used when deciding whether to proceed with a complaint.

The criteria listed here are **not exhaustive** and should be used as a guide only. The criteria are not listed in order of priority. The weight given to any criterion will depend on the individual complaint and other factors such as the operational requirements of the section.

After you have considered the criteria and formed a recommendation, you should consult with your Regional Manager before making a final decision.

#### **Criteria**

- Confirm that the matter is within jurisdiction. Do not investigate any complaint which falls outside of the WRA, the Workplace Relations Regulations or the National Code of Practice for the Construction Industry (the Code). (All alleged breaches of the Code must be reported to the CMG or PCMG (Alice to Darwin Rail Project) and the client agency).



- Give priority to assisting small business and individuals rather than large organisations, e.g. large unions, businesses and corporations. Large organisations have the legal and financial resources to pursue matters on their own behalf or on behalf of a member.
- Consider whether the investigation is likely to result in a decision that will assist the OEA in interpreting or applying a section of the WRA. Such a decision may be achieved through successful court action (precedents) or an opinion from Legal Counsel.
- Give priority to parties who are from a disadvantaged group as defined by s83BB(2)(a) of the WRA. Examples of such groups are women, young people, apprentices, trainees, outworkers or people from NESB.
- Consider the likely outcomes that may be achieved if the investigation proceeds:
  - Is the investigation likely to advance compliance with the WRA or the Code?
  - Could the investigation have a deterrent effect on an industry-wide, local or national basis?
  - Is there an opportunity available for education on an industry-wide, local or national basis?
  - Will the likely outcomes contribute to the objectives of the OEA?
- Decide whether the matter could be referred elsewhere. For example, termination issues, which fall within Part XA of the WRA, are better dealt with by the Australian Industrial Relations Commission.
- Establish that the complaint meets the threshold for prima facie evidence of a breach.
- Is the allegation provable?
- Is there evidence to support the allegation without embarking on a “fishing trip”?
- Consider whether the allegation has been made against a person or organisation with a history of non-compliance.
- Consider the amount of time that has transpired since the alleged breach occurred and how this will affect the investigation.
- Is the alleged behaviour recurring or is it a one-off or old occurrence?
- Determine whether the complainant is “jurisdiction shopping”:
  - Has the matter already been dealt with in another jurisdiction?
  - Is the complainant using the OEA to get a “better result”? For example, the unfair dismissal claim may have been dismissed and the complainant has approached the OEA with a Part XA complaint based on the same facts.
  - Is the complainant currently engaged in a dispute before an Australian Industrial Relations Commission or Court proceedings? Does the complaint relate to an element of that dispute?

### *Deciding not to inquire into a complaint*

As stated earlier, there is no actual or implied legislative provision that requires the OEA to deal with all complaints that are received. There is a discretion not to inquire into a complaint. The exercise of this discretion should be considered by the officer assessing the complaint, in consultation with their manager.

The CSN officer must be satisfied that there is prima facie evidence of a breach and should apply the above stated criteria before determining whether or not to proceed.

If a decision is made not to proceed, the reasons for the decision should be documented and the Complainant advised of the reason for this decision verbally. However, all written complaints and inquiries should be responded to in writing. In line with the procedures of this manual all relevant documents, including all written and oral advice provided, should be recorded in COMS.

### *Referrals to other agencies*

If a decision is made not to action a complaint or if the matter falls outside the jurisdiction of the OEA, you should try to refer the complainant to another authority where appropriate.

For example, if an employee has been terminated for a prohibited reason under Part XA of the WRA, it may be appropriate to refer them to the AIRC where the matter can be determined under Part VIA Division 3 of the WRA.

If you need to refer a complaint or enquiry to a law enforcement or other agency, you should forward the matter to your manager who will refer it to the CSN Manager North/South if appropriate. OEA referrals will be made in accordance with any protocols reached with those agencies, e.g. ACCC.

### *Right of entry matters*

A Right of Entry complaint regarding inappropriate behaviour by permit holders, is a matter that may be best dealt with by the employer bringing their own AIRC proceedings. This will invoke the Commission's dispute resolution powers which include more specific powers under s285G(2) than are available in proceedings against a breach of s285A(3).

The OEA can provide assistance to the employer in this regard. The focus in providing that assistance should be directed at voluntary compliance. The assistance you can provide may include, interviewing witnesses and obtaining information about inappropriate behaviour. In these circumstances you will rely on your powers as an Inspector, not an Authorised Officer.

The Legal Section may assist by:

- Providing information and advice about getting disputes over Right of Entry before the Commission and obtaining an appropriate outcome. Note that in practice, the Commission allows the same informal approaches as for industrial disputes (see Rule 15).
- Providing information and material about previous cases.

Alternatively a Right of Entry complaint may reveal breaches of s285E and you should seek voluntary compliance. If voluntary compliance cannot be achieved,

the OEA may proceed against persons, including permit holders, who breach the Right of Entry penalty provisions (s285E). The proceedings may be brought in a Magistrate's, Local or District/County Court as well as the Federal Court.

Finally, if the behaviour which is the subject of the complaint is widespread or indiscriminate, you can make an application to revoke the permit under s285A(3). This application will rely upon any relevant matters that may have initially been the subject of a dispute before the Commission or penalty provisions (s285G or E). Refer to *Court proceedings brought by an Inspector*.

## Initiating the investigation

### *Assessing the initial complaint*

When you receive a complaint, you should try to obtain as much detail as possible about the complaint during the first contact with the complainant. You need to obtain enough information to ensure that the complaint is not vexatious nor without substance, and that any investigation undertaken will not result in a waste of resources.

Where possible you should also make further preliminary telephone calls to either confirm or refute the allegations made in the complaint. Consider the resources which will be required to conduct the inquiry or investigation, and what additional evidence will be required to establish a prima facie case. You should then discuss the merits of the complaint with your Regional Manager before committing any further resources.

If you require supporting evidence to substantiate the breach, you should request and obtain this from the complainant in the first instance.

### *Recording matter in COMS*

You should record details of complaints, inquiries and legal matters on the Compliance Operational Management System (COMS) as soon as possible.

All matters should be initially recorded as a "general enquiry" on COMS. Only after the application of the "criteria to determine whether to proceed" is satisfied is the matter reclassified as an "investigation". The question as to whether those criteria are met should be discussed with the Regional Manager.

You should ensure that:

- all relevant details are entered
- a detailed account of actions undertaken is provided
- subsequent follow-up actions are accurately recorded.

The details you provide should allow another officer to read through the entries and obtain a clear understanding of what has occurred and what further action should be taken if required.

When a matter is re-assigned, the Officer who takes over the case must ensure that the relevant COMS entries are updated to reflect the re-assignment, (ie entries in fields Matter, Case Officer, Primary / Secondary Case).

Refer to the **COMS Manual** for information about using COMS.

## *Creating an investigation plan*

### **Objectives**

An investigation plan is created to meet the following objectives:

- to create a clear and shared concept of the direction of the investigation
- to identify the timeframes for the investigation
- to outline the roles of everyone involved in the investigation
- to support decision-making during the course of the investigation
- to form the basis for ongoing evaluation of the investigation.

### **Initiating the investigation plan**

You should initiate the formulation of an investigation plan if the initial assessment of a complaint indicates that it will be a significant matter or when requested by the manager. “Significant” in this context means matters that are likely to involve numerous witnesses, may become protracted or for varied reasons is of sensitivity or of importance to the OEA. Any matter in which interlocutory injunctions are planned and /or perused should have an investigation plan developed in conjunction with the relevant legal officer. Officers in the CSN are encouraged to use investigation plans for the purposes of planning and focusing their investigations.

You should arrange a meeting to discuss the investigation, to be attended by yourself as the investigator of the complaint, your Regional Manager and a Legal Officer. One objective of this discussion should be agreement to an investigation plan.

### **What should be covered in the plan**

An investigation plan does not have to be a lengthy or formal document. When formulating the plan, consider:

- the alleged breach of the WRA
- the elements of the breach
- what evidence is needed to prove the elements, and
- who is going to obtain that proof and how. For example, proof may include statements from complainants and witnesses, documents or records of interview with the complainant.

The plan should cover:

- the complainant’s desired outcome
- the OEA’s desired outcome, in particular emphasising voluntary compliance and a swift resolution
- the actions required from the respondent or subject of the complaint
- the actions to be undertaken by investigation team members
- the estimated timeframe for completion of the investigation. Include any significant milestones.

When setting timeframes for the investigation, consider:

- the complainant’s needs
- any relevant Business Plan targets

- the workload of officers involved in the investigation.

If the investigation is more complex, the plan may also include additional considerations such as:

- the stages or sequencing of enquiries
- required resources, e.g. additional officer, travel.

#### **After the plan has been agreed upon**

When the plan has been agreed upon, right fax it into COMS and place it on the investigation file if one exists.

The plan forms the frame of reference for case discussions throughout the investigation. The plan should be modified or updated as required during the course of the investigation.

### *Evaluating the progress of an investigation*

#### **Evaluation aims**

Progress must be monitored on all investigations. The aim of monitoring is to ensure that the investigation is proceeding efficiently and effectively to achieve the desired outcome. You should measure the progress of the investigation against the objectives set out in the investigation plan.

You should also regularly assess whether the investigation should proceed. Take into account the:

- prospects of a successful outcome
- consequences of not proceeding
- resources required for further investigation
- competing demands for resources.

#### **Method of evaluation**

Monitoring and evaluation can be achieved by regular discussion between you as the investigator, your Regional Manager, and the Legal Officer assigned to the case.

It is useful in this context to review recent actions and ask:

- “What has worked well?”
- “What should be done differently next time?”.

You should pay particular attention to the application of any Business Plan indicators. These may be significant in determining the priority of measures under consideration at any stage of the investigation. Click [here](#) to view information about the Business Plan.

Record a summary of discussions, and the assessment of progress, as an action entry in COMS.

#### **If the investigation is to be discontinued**

If a decision is taken to discontinue the investigation, consideration must be given to the impact on the complainant.

You should ensure that measures implemented to achieve closure, such as final letters, take into account the needs of the complainant and the original objectives of the investigation. In some cases, it may be beneficial to arrange for the complainant to speak with an OEA Legal Officer as part of the closure process.

## Requesting legal advice

### *Overview*

It is the approach of the Legal Section to encourage internal requests for advice from all parts of the OEA. In particular, as Legal Officers and CSN Officers work together in a team environment it is expected that there will be regular ongoing dialogue in relation to matters that require or would benefit from legal input.

It is important to maintain appropriate records of legal advices. It is also important that the information that is being sought is set out clearly.

The following procedures will operate in relation to advices:

- All advice needs to be approved by a Legal Manager.
- Once advice is provided it is to be circulated to all other Legal Officers (and other OEA officers as considered appropriate).
- All requests are to be actioned within the timelines set out in the business plan.
- Requests pursuant to the internet Q & A service need to be actioned within 48 hours.

If an advice is significant or groundbreaking, a hard copy of the advice will also be placed on the Legal Advising file maintained by the Senior Legal Manager. In such cases, the matter may also be referred to DEWR/AGS/external counsel for advice.

### *Requests from CSN*

General enquiries may be made and responded to verbally. Any case-specific requests for advice should be provided in writing, although they can be discussed and expanded upon verbally.

The legal advice must be provided in writing and be either from or approved by a Legal Manager.

While the relevant CSN Officer has responsibility for ensuring that all relevant documents and file notes are placed in COMS, agreement should be sought as to who will attach the advice. A copy of the legal advice may be kept on the hard copy complaint file if there is one.

### *Requests from National AWA Team*

Problems with any complexity should be recorded in writing, although straightforward or simple matters may be referred verbally by the case officer.

The legal response as approved by a Legal Manager should be in writing although it may confirm a verbal advice.

Copies of the advice should be sent to the Deputy Employment Advocate, CSN, Managers CSN and the relevant Regional Manager.

The Legal Officer will store the advice and response in the legal advices public folders.

### *Requests from Executive members*

On receipt of written or verbal request from one of the executive, the Legal Officer records the request and responds in writing, which may be a confirmation of verbal advice.

The advice as approved by a Legal Manager is forwarded to the executive member.

The Legal Officer maintains a copy of the advice.

### *Requests from NTAS*

Enquiries will often be referred from the NTAS to the Legal Section. They will usually be verbal requests. Legal Officers will provide a quick response (approved by a Legal Manager) which may be verbal. This should be followed up with an email. The Legal Officer should maintain a record of these advices.

If the request is vague or unclear, the caller should be requested to clarify the matter and, if possible, to provide a request in writing. Be sure to take into account the circumstances and capacity of the caller in this regard, i.e. we should not require that there be a written request.

Written requests to NTAS (and through the internet Q & A service) are responded to in writing.

## Progressing matters to litigation

### *Role of CSN officers and lawyers*

All complaints or enquiries that come into the OEA will, unless they can be dealt with by the provision of legal advice only, be allocated to a particular CSN Officer via the Regional Manager. The CSN Officer has the primary carriage of the matter until it is resolved or until it becomes the basis for litigation.

The Regional Manager ensures that matters within their area of responsibility are dealt with appropriately within the requirements of the Business Plan. The Regional Manager should also guide and mentor the CSN Officer as appropriate and allocate priorities and resources within the geographic area.

### **Seeking legal input**

Either the CSN Officer or the Regional Manager, or both in conjunction, should identify those investigations that require early legal input and seek input from the relevant Legal Officer.

In addition, all significant new matters should be discussed at the regular meeting to decide whether there is a need for legal input, if this has not already occurred.

Where legal input is required, the Legal Officer will provide advice directly to the CSN Officer and/or the Regional Manager.

### **Team investigations**

Where appropriate, some matters will be treated as a team investigation involving the CSN Officer, the Regional Manager and the Legal Officer.

Such matters should be discussed at the regular weekly meetings and, if necessary, ad hoc meetings.

It is the responsibility of all the team members using their respective skills to ensure that the matter is appropriately reviewed, progressed and completed.

### ***Role of the CSN Manager North/ South***

The role of the CSN Manager North/ South is to ensure, on an overall basis, that investigations are being completed appropriately and within the timeframes of the Business Plan. In addition, the CSN Manager North/ South should identify appropriate priority matters on a regular basis.

The CSN Manager North/ South should also take an active role in the progression of such priority matters, in particular ministerials, high profile complaints (including from MPs/unions), etc.

The CSN Manager North/ South is also responsible for the movement and allocation of particular resources across geographic areas where required.

### ***Role of the Senior Legal Manager (SLM)***

The Senior Legal Manager is responsible for matters where legal proceedings are to be taken. While such decisions are taken by the relevant delegate, they are to be taken in consultation with the DEA CSN and the relevant managers/officers.

### ***Voluntary compliance***

Voluntary compliance is dealt with earlier in the manual. In each case the team responsible for the matter will consider what would constitute voluntary compliance and how it is to be sought. Responsibility for such determinations rests with the relevant Regional Manager, but the process may well involve the CSN Manager North/ South, SLM and EA, depending on the nature of the matter.

If voluntary compliance is achieved the matter is complete. It should be finalised in accordance with the procedures set out in this manual.



If voluntary compliance is not achieved the matter should be reviewed and assessed for the purposes of recommending what further action, if any should be taken by the OEA.

Options available include:

- A recommendation that no further action be taken
- Referral to another agency that may be able to offer assistance to the Complainant
- Further investigation
- Referral to the Legal section for assistance in determining whether the matters should be prepared for litigation

In considering which option is appropriate, particularly if it is recommended that a matter proceed to legal action, the EA and the SLM may need to be briefed.

## *Litigation*

Once a matter has reached a point where voluntary compliance has not been achieved and there appears to be sufficient evidence to consider legal action, the relevant Legal Officer will assume responsibility for the matter. The team approach is continued.

The CSN Officer, Regional Manager and CSN Manager North/ South with assistance from the relevant Legal Officer, will ensure that the material required to complete the brief, and/or answer Counsel's requisitions, and/or answer the EA/SLM's requirements, is obtained.

The EA/SLM will have regard to the criteria for taking legal action in making their decision. Click [here](#) for the criteria.

Once a decision is made to proceed by the EA (or SLM as appropriate), the Legal Officer will, in conjunction with AGS/Counsel, have the necessary applications drafted, and evidence marshalled.

Getting evidence into admissible form involves the team working with relevant witnesses, usually as a priority matter.

Parties may apply to the EA for legal assistance in relation to AWA and FOA matters (s83BB). To see the criteria for legal assistance, click [here](#).

## *Briefing Counsel*

The OEA should brief Counsel only after the Legal Section has formed a view about the issues in question. For example, where the Legal Officer is satisfied that proceedings should be instituted, the advice of Counsel is sought to confirm this (and perhaps to raise any concerns that the OEA may have). A Legal Manager's approval is needed to brief Counsel.

Except in situations where there is a need for urgent interlocutory (interim) orders, the OEA should not brief Counsel unless the OEA has completed all necessary investigative tasks, and are able to provide Counsel with a reasonably accurate picture of the evidence that is or is likely to be available. In the case of urgent matters, the OEA clearly will need to adopt a more abbreviated approach.

In briefing Counsel, Legal Officers should in their observations:

- Ensure that they have set out the facts and information regarding the matter and refer Counsel to the relevant parts of the material or statements which support any assertions that are made in our observations, e.g. “see tab 1”, etc.
- Identify the relevant evidence law applicable in the particular case.
- Identify weaknesses in the evidence and, if possible, ways in which such weaknesses may be addressed. Weaknesses may exist because:
  - we have not yet been able to obtain the evidence
  - some of the evidence is contradictory
  - one or other of the witnesses lacks credibility (we should describe why)
  - difficulties in relation to proof, i.e. hearsay.
- Make Counsel aware of any views expressed by an investigator about either the complainant and/or any witness and their reliability.
- Relate the facts to the law and identify strengths and weaknesses in applying the law to the facts.

Legal Officers should not generally seek general advice from Counsel on the issue of evidence. The Legal Section should address these issues and only seek advice from Counsel in unusual or complex situations.

### *Court proceedings brought by an Inspector*

Proceedings brought by an Inspector, rather than the Employment Advocate, will be in relation to right of entry matters (including revocation), S170NC and strike pay.

OEA CSN Officers (as are all OEA officers) are employed by the Secretary DEWR on behalf of the Commonwealth, and are made available to the EA pursuant to s83BD of the Workplace Relations Act (WRA).

### **Revocation Proceedings**

Note that the OEA’s approach to right of entry is not generally to pursue such applications.

The WRA under s285A(3) allows application to be made to the Registrar for revocation in accordance with the regulations.

Regulation 109C(1)(c) provides that an application for revocation may be made by an Inspector claiming that:

- an employer, or an employee of an employer, has been hindered or obstructed by the holder of the permit, or
- the holder of the permit has otherwise acted in an improper manner.

Regulation 109C(2) sets out that the application must be in writing and signed by the applicant, and should include the grounds in which the application is made.

Accordingly, an Inspector making the claims required by regulation 109C(1)(c) is able to bring an application.

OEA officers are appointed Inspectors under s84 in the WRA. Under s84(5), the Minister may, by notice published in the Gazette, give directions specifying:

- the manner in which, and
- any conditions and qualifications subject to which,

powers or functions conferred on Inspectors are to be exercised or performed.

The Minister has delegated that power to the Secretary, who has made a series of such directions. The latest directions were made on the 1<sup>st</sup> December 1999. Those directions include certain requirements if an Inspector is making an application under regulation 109C(1)(c). The directions also apply (as far as relevant to the OEA) to any application for breach of s170NC or for a breach of the strike pay provisions.

The directions (as far as is relevant to the taking of such actions) require that litigation action can only be undertaken with the consent of the OEA Senior Legal Manager or the Group Manager for the Office of Workplace Services (OWS).

The directions emphasise the need to seek voluntary compliance prior to taking litigation action. However, paragraph 5 of the directions provides that it is not necessary to seek voluntary compliance in certain circumstances, e.g. if the Senior Legal Manager, or Group Manager for the OWS, are of the view that seeking voluntary compliance is not the most efficient and effective method of addressing the particular matter. Examples provided of such circumstances are where there is prior knowledge of the parties, or because of the parties' history; or because the matter warrants urgent action. As stated elsewhere, the OEA's approach is to pursue voluntary compliance with litigation as the last resort.

The investigation process will obviously occur in accordance with normal procedures, with the Inspector gathering evidence with advice and input from the relevant Legal Officer.

Once the evidence gathering is completed, then advice is sought from that Legal Officer. The Legal Officer may well seek advice from Counsel at this stage.

Once that advice has been obtained, the Inspector is then in a position to assess the matter and make a recommendation (based on the advice obtained) to the Senior Legal Manager. That recommendation should go to the relevant Legal Officer/Manager and the relevant Regional Manager/CSN Manager North/South /DEA CSN for their comments.

The recommendation should deal with the issue of voluntary compliance. It should also have regard to the criteria for taking legal action.

The Senior Legal Manager considers the matter and then either approves or does not approve the taking of legal action.

A copy of the approval/non approval should be stored with the compliance file.

## Right of Entry breaches

In relation to other breaches of the Right of Entry provisions, s285F WRA provides that application may be made to an eligible court by any person, which includes an Inspector. The directions apply pursuant to regulation 9(3) and the same process as set out in "*Revocation Proceedings*" should occur.

## S170NC

In relation to s170NC WRA, s170NF(7)(e) provides that an Inspector can make an application for breach of s170NC to an eligible Court. Again the directions apply pursuant to regulation 9(3) and the same process as set out in “*Revocation Proceedings*” in this manual should occur.

## Strike Pay

In relation to strike pay, the application may be made pursuant to s187AC(2)(c) by, amongst others, any person prescribed by the regulation. The regulations were amended in May 1999 to prescribe an Inspector as being able to take that action.

Again the directions apply. Section 187AC is specifically referred to in the directions. The same process as set out in “*Revocation Proceedings*” in this manual should occur.

## Contacting the Respondent

There are two issues in relation to contacting the respondent.

One is seeking voluntary compliance. In this case, the approach will be to act in accordance with the directions, which emphasise voluntary compliance except in the circumstances set out in paragraph 5 of those directions and discussed in this manual under “*Proceedings*” and “*Voluntary compliance*”.

The second point is approaching the defendant or respondent to give them an opportunity to respond to the allegations made. This should **always** occur prior to the commencement of proceedings, unless there are extenuating circumstances, e.g. where an urgent injunction is required. In this case, the SLM’s approval to not approach the defendant/respondent should be sought. It may be appropriate to impose some time limit, e.g. 7 days, for the response.

## Statement

In all matters where litigation is commenced, the applicant Inspector should prepare a statement setting out the process that has occurred. Whether or not that statement is converted into an affidavit, or the applicant or other OEA officers give evidence, is a matter for determination in each case.

## File management

### *Recording/ storing of all material regarding a complaint*

As soon as a complaint is received by the CSN, it should be recorded as a matter on COMS where it will be automatically given a COMS number. It is expected that these matters will either come directly to the CSN or through the NTAS, Legal Section, EA or other units within the OEA. Initially all matters are to be recorded as inquiries. Their status will only be changed to an investigation when they meet the “criteria used to determine whether to proceed” set out elsewhere in this Manual.

A hard copy file should be created with the COMS file number and a description of the matters contained on the file. The CSN files should be standard form and colour.

COMS is the primary repository of all material regarding the complaint.

In particular:

- All file notes and internally generated file notes, hand record, memoranda, statements, records of interview, and letters must be on COMS.
- All original signed statements or records of interview and the signed letters sent from the OEA must be right faxed and attached to COMS. The originals (and copies of letters sent out) are to be placed on the hard copy file in chronological order (for example the oldest document is placed 1<sup>st</sup> on the file subsequent documents placed on top).
- All correspondence and other documents received (eg site diaries/ certified agreements/ OH&S notices) are to be right faxed and attached to COMS. Again the originals must be placed on the hard copy file. In the event that the volume of the material is considerable, authorisation can be sought from the Regional Manager (or from the lawyers, the SLM) for dispensation from the need to attach to COMS. If this is the case there should be appropriate file note in COMS and the material should be maintained on the hard copy file.
- Copies of material can be kept on the hard copy file but this is not the primary repository.
- Diaries and other notebooks may be used but are not to be used as a means of maintaining information. Any material so recorded should be typed up and put into COMS or (if legible) right faxed and attached to COMS. Diaries may be used as a time recording/ management advice.
- Any material on OEA internal drives including the P drive relevant to complaints is not to be retained on those drives but is to be transferred to COMS. Documents that remain on the P drive should be drafts only (if there is some reason to retain such drafts).
- Copies of all finalised letters (signed and dated) should be placed on COMS (please note that in line with the procedures in this manual any correspondence relating to a complaint must include the COMS reference and the initials of the relevant officer at the top left hand side of the document – for example “Our ref:AB/COMS1234”).
- Any material stored in Outlook relevant to the complaint should be transferred to COMS.

### *Principle regarding what should be recorded on the case file*

All steps required to be undertaken by the Procedures Manual should be both taken and recorded as being taken in COMS. COMS should be maintained in such a state that if another officer were to take over the file they would be able to read through the file and have a full understanding of the matter and the steps taken without the need to look at other material.

### **TRIM Files**

Trim files should be maintained for all matters that are not complaint specific.

### Legal Files

Once a decision is taken to take legal action a new hard copy file should be created for the matter which should be a different form/colour to the CSN file. The COMS number should be maintained for the matter and the same rules set out above for dealing with complaints should apply to the material in relation to the documentation relating to the legal proceedings.

### Exhibits

Evidence and exhibits for court proceeding should continue to be kept in sealed areas. Depending on the nature of the evidence it should be right faxed into COMS or there should be a note included in COMS detailing description and location.

### Storage of files

Hard copy files should be either in the control of the case officer or should be stored in a secure area. Maintenance of the secure area is the responsibility of the Regional Manager.

## Document Naming

Regardless of the form, all documents are to be 'saved as' or named in the following style:

- file number, e.g. 12345 being the COMS or TRIM number
- document name, e.g. 'Senate Estimates Hearing Briefing'
- other relevant information, e.g. '3<sup>rd</sup> draft', or the date.

An example of a document named according to these conventions is:

12578 Senate Estimates Hearing Briefing 3.6.01

The document name must be recorded in the footer of the document. To do this in Word:

1. From the View menu, select Header and Footer.
2. Ensure the cursor is positioned in the footer.
3. Click the Insert Auto Text button.
4. Select Filename from the dropdown list.

## Correspondence

The OEA has developed a correspondence guide that is available on the OEA intranet. *Press Ctrl and left mouse click to view.*

[http://fimtan104:81/graphics.asp?showdoc=OPUS%2Ffunctions%2Fsearch%2Fsearch\\_title.asp&qu=Correspondence+guide](http://fimtan104:81/graphics.asp?showdoc=OPUS%2Ffunctions%2Fsearch%2Fsearch_title.asp&qu=Correspondence+guide)

In general terms, this means that correspondence in relation to particular matters may be signed by the relevant Regional Manager, unless that correspondence falls into one of the categories contained in the correspondence guide that needs to be signed by the Employment Advocate or the Senior Legal Manager or by DEA CSN or by CNS Manager North/South.

In particular, these types of letters can be signed by the Regional Manager:

- acknowledgement letters
- letters outlining the progress of matters
- letters closing matters.

All letters containing legal advice should be prepared by or in consultation with a Legal Officer and are to be approved by the Senior Legal Manager.

In particular, any matters prepared for internal use, i.e. legal advisings/reports/minutes, are not to be provided directly to anyone external to the OEA except with the specific approval of the Senior Legal Manager.

# Chapter 6: Investigation techniques

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## Overview of evidence

### *Collection and presentation of evidence*

Evidence is admissible material collected and produced in an attempt to prove or disprove a fact in issue.

When collecting evidence, you should consider:

- basic administrative law principles such as natural justice and procedural fairness
- rules of evidence
- directions by the Minister and the EA regarding voluntary compliance
- Commonwealth “model litigant” policy. For more information, refer to *What constitutes a complaint?*.

### *What evidence is required?*

The likely outcome of the handling of a complaint must be considered at the time of planning the investigation. The evidence that is needed will depend on the type of breach and what action is proposed.

The focus of the OEA is on the quick resolution of matters through voluntary compliance. Where this can be achieved, the need to gather evidence which is acceptable to the courts is greatly reduced. For the purpose of voluntary compliance, evidence does not have to be formalised to comply with rules of evidence. Evidence in the form of file notes of conversations may be sufficient. The type of evidence to be gathered should be discussed with the relevant Regional Manager and Legal Officer.

The evidence required should be clearly documented on COMS.

### *Standards of proof*

The standard of proof applicable to the OEA is the civil standard which is “on the balance of probabilities”.



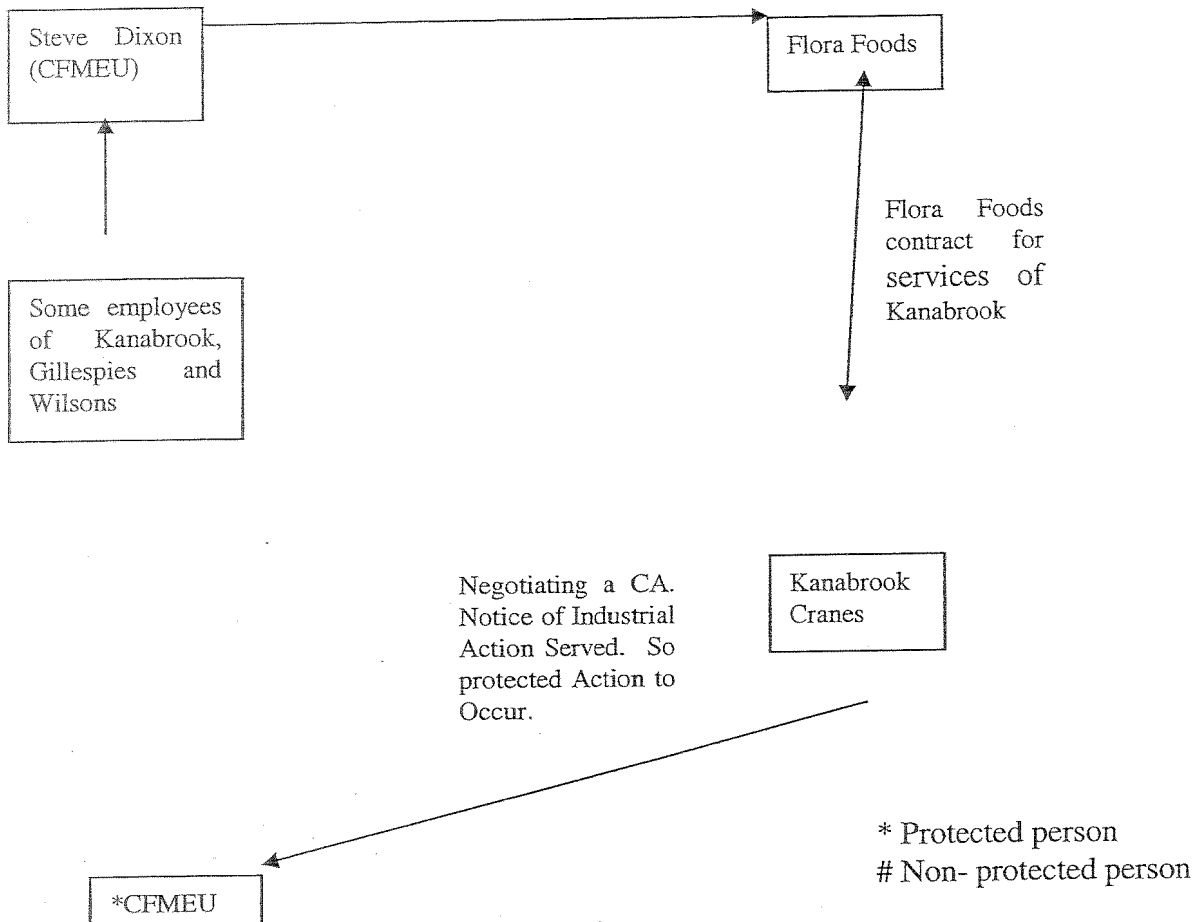
## Points of proof

### Points of Proof – s170NC (1)

1. S170NC provides as follows:
  1. A **person** must not:
    - a. take or threaten to take any industrial action or other action;
    - b. refrain or threaten to refrain from taking any action; with intent to coerce another person to agree, or not to agree, to:
      - making, varying or terminating, or extending the nominal expiry date of, an agreement under Division 2 or 3; or
      - approving any of the things mentioned in paragraph (c).
  2. Subsection (1) does not apply to action, or industrial action, that is protected action (within the meaning of Division 8).
2. Before dealing with the elements of subsection (1) we should in any investigation firstly determine whether or not there is any “protected action” occurring which would enliven the provisions of subsection (2) so that any such action would not be a contravention of subsection (1).
3. For there to be “**Protected Action**” there must have been initiated a bargaining period. Relevant provisions in this regard are as follows:
  - s170MI – initiation of bargaining period by provision of written notice etc.
  - s170MJ - sets out the particulars required to accompany the said notice (*note- in CPSU v Victoria the Full Bench said that the omission of particulars required in (d) and (e) did not invalidate the notice.*)
  - s170MK - sets out when the bargaining period begins
  - s170ML – deals with entitlement to take protected action. In the case of **protected action** by employees subsection (2) provides that the persons or entities described in sub-paragraphs (a) to (d) are entitled to organise or engage in industrial action “**directly**” against the employer (if the industrial or other action is not directly against the employer then it is not protected action. However, if 'direct' action has an indirect effect on a third party this would not be sufficient to deprive the direct action of its protected action status-see F.H.Transport case.)
  - s170MO provides for example that where the relevant parties seek to take protected action then there are certain prerequisites ie the giving of notice. Where any action has been taken by employees in response to a lockout then the organisation or the employees have to give the employer written notice of the intention to take action. However, if it is in any other case ie not a lock out the organisation or the employees must give the employer at least 3 days written notice of the intention to take action. By virtue of the provisions of subsection (5) the notice must state the nature of the intended action and the day when it will begin. (*In the crane investigation various employers were asked whether they had received a notice pursuant to s170MO a number of employers indicated they had not. However the employers were represented by an employer association and it was subsequently determined that in some cases the notice had been forwarded to the association. It is therefore worth remembering in any future*

*investigation that where an employer association is involved we should ask both the employer and the association whether or not a notice has been received).*

4. Significantly even if the bargaining period has been properly initiated and the requirements have been complied with in relation to the issuing of the notice any industrial or other action may still lose the status of **protected action** if:
  - it is not directly against the employer – s170ML
  - industrial action is taken prior to the expiry date of an existing agreement – s170MN
  - no genuine attempt at negotiation has occurred prior to any industrial action – s170MP
  - if the exceptions in s170MT (2) apply
  - the industrial action etc must be duly authorised by the union in accordance with the rules of the union and written notice of such authorisation must be given to the Registrar-s.170MR. *(In the crane matter the notices given to the Registrar referred to authorisations given in 1995, three years before the actual industrial action was taken. Had the crane matter gone to hearing an issue canvassed by us would have been whether this purported authorisation in 1995 of industrial action in 1998 could be said to comply with the relevant provisions of s170MR.)(note - in CPSU v Victoria the Full Bench stated that technical defects in the authorisation would not invalidate the authorisation.)*
  - where the industrial action or other action involves a secondary boycott (not in the Trade Practices sense) – s170MM - the essence of this is that it deals with industrial action or other action which involves a person or entity who is not a “protected person” as defined in s170MM (3). *For example the Flora Foods incident in crane matter where Dixon tells Flora Foods management that Kanabrook will not enter a union CA and therefore he wants them off site or he & others will picket Flora Foods.*



5. Elements of s170NC (1):

- a. Person – means natural person or a body corporate (such as the union)
- b. Take/threaten to take – In relation to 'threaten to take' Senior Counsel suggests that the threat must be in substance that the person himself or herself will take the action. The threat must be explicit either in itself or having regard to the overall circumstances in which it is made.
- c. Industrial action – see the definition in section 4
- d. Other action – there is some question as to whether or not these words are qualified by the fact that they follow the words “industrial action” or whether the words should be read more broadly. The view taken by Senior Counsel in the crane matter was that they should be read as referring to action which is not industrial action as defined in section 4.
- e. Intent – the intent of the person whose conduct is the subject of investigation will usually be a matter of inference from the words/deeds of the said person or in the case of a body corporate representatives of the said person (see s.349 of the Act).
- f. Coerce – there is some difference of opinion as to the meaning of "coerce" in s.170NC. It has been argued that coercion involves "wrongful, illegitimate or illegal action or at any rate negation of choice". Another view is that it should be interpreted in a more everyday sense of "To compel or force to do anything". The Victorian Court of Appeal in National

Workforce Pty Ltd & Ors v AMWU, although not deciding the point, appeared to favour the latter meaning. Coercion is something less than duress.

- g. Make an agreement under Division 2 or 3 – at the heart of any alleged contravention must be the taking of the industrial action etc in furtherance of the purpose of obtaining a Division 2 or 3 agreement.

## 6. Remedies

s170NF (1), (2) and (7) (e) are the relevant provisions which deal with the penalties for a breach of s170NC; and who is entitled to take proceedings for such a contravention. S170NG empowers the Court to grant injunctions, including interlocutory injunctions. An issue that remains to be determined however, is whether or not an inspector can seek an injunction.

## Points of Proof- PART XA

1. In considering conduct of representatives of unions we should keep in mind the deeming provisions in s.298B(2) and (3).
2. Part XA is not of universal application. Part XA applies to the following types of conduct:
  - conduct by an organisation of employers or employees registered under the Workplace Relations Act 1996 (see 298D (a));
  - Conduct by an officer of an organisation acting in the capacity (see 298D (b));
  - Conduct carried out with a purpose or intent relating to a person's membership or non-membership of an organisation (see 298D (c));
  - Conduct carried out with a purpose or intent relating to a person's participation or non-participation in industrial action within the meaning of section 4(1) of the Act (see 298E);
  - Conduct carried out with a purpose or intent relating to a person's participation or non-participation in any proceedings under the Workplace Relations Act (see 298F (1) (a)), or any other activity for which the Act provides (see 298F (1) (b));
  - Conduct carried out with a purpose or intent relating to the fact that an award, certified agreement or an Australian Workplace Agreement (AWA) applies to a person's employment (see 298F (2) (a)), or the fact that the person is bound by an award, a certified agreement or an AWA (see 298F (2) (b)).

In addition, Part XA applies to conduct:

- by a constitutional corporation (see 298G (1) (a));
- adversely affecting a constitutional corporation (see 298G (1) (b)).

Conduct will be taken to adversely affect a constitutional corporation if:

- the constitutional corporation is the person against whom the conduct is being carried out (see 298G (2) (a)); or
- the conduct is being carried out against an employee of the constitutional corporation, or an independent contractor engaged by the constitutional corporation, and affects the employee or independent contractor in that capacity (see 298G (2) (b)).

3. It is important to note that a contravention of s.298K (and s.298P(3)) will occur so long as one of reasons for the conduct is a prohibited reason. The prohibited reason must of course be a significant and operative factor leading to the relevant conduct. Section 298K (1) an employer must not, for a prohibited reason, or for reasons that include prohibited reason, do or threaten to do any of the following:

- a. **DISMISS AN EMPLOYEE** - the conduct must result in dismissal or the threat must be of dismissal. There must be a clear termination of the employment relationship. In *Causer v Austral Bronze Cranes Copper Pty Ltd* it was held that termination of an employee was not “a dismissal” where the employee had refused an offer of alternative employment by the employer after the reorganisation of the employer’s business.

**Proof is necessary of :**

1. The existence of an employment relationship;
  2. The dismissal or the threat of dismissal (the evidence may be oral or written or both). In the case of a threat it is possible there will no evidence of an express threat but a series of circumstances from which the threat can be inferred.
- b. **INJURE AN EMPLOYEE IN HIS OR HER EMPLOYMENT** - The Courts have said this means the removal of one or more of the immediate practical incidents of employment for example loss of pay or reduction in rank (see *Re Childs v Metro Transport Trust*).

In the *Patricks case* North J said that the concept of injury and prejudicial alteration were concepts of wide operation capable of referring to the effect of a commercial transaction entered into by an employer which has, or may have, an unfavourable impact on employees. Injury is not limited to financial harm it includes any conduct which directly impacts on the employee causing actual harm or detriment. The High Court in the *Patricks case* said that this provision covers injury of **any compensable type**.

**Proof is necessary of:**

1. The employment relationship;
  2. The conduct engaged in ( remember where the issue is a threat even where there is no evidence of an express threat it may be implied from the circumstances );
  3. The nature of the injury;
  4. Full details of the consequences or likely consequences of such injury for the relevant employee.
- c. **ALTER THE POSITION OF AN EMPLOYEE TO THE EMPLOYEE'S PREJUDICE** - This can include acts done outside the employment relationship see *AMIEU v Gilbertson Pty Ltd* ie blackbanning a potential employee for example an employee engaged on daily hire.

As indicated in relation to paragraph (b) *North J in Patricks* said the concept was of wide operation. The *High Court in Patricks* said that this

covers not only legal injury but any adverse affect on, or deterioration in, the advantages enjoyed by the employees before the conduct in question.

**Proof is necessary of:**

1. The employment relationship;
  2. The alteration in position that has occurred(or has been threatened [may be implicit] );
  3. The nature and details of the prejudice; and
  4. The link between the act of the employer, the alteration of the employee's position and the resulting prejudice.
- d. **REFUSE TO EMPLOY ANOTHER PERSON** - It was held in *Fraser v Fletcher Constructions Australia Limited* that to establish a refusal to employ there must be evidence of a position or vacancy in existence at the time of the refusal (see also *Moss v Fantil P/L*; of *Orange City Bowling Club v Federated Liquor Union* – both decisions of NSW Industrial Tribunal).

Proof is necessary of:

1. The existence of a position or vacancy with the said employer;
  2. The relevant person having sought the said position;
  3. Refusal or threat of refusal ( may be implicit)
- e. **DISCRIMINATE AGAINST ANOTHER PERSON IN THE TERMS OR CONDITIONS ON WHICH THE EMPLOYER OFFERS TO EMPLOY THE OTHER PERSON** - Discrimination is to treat someone with a particular characteristic less favourably than someone without that characteristic in the terms and conditions of employment offered. The particular characteristic for our purposes will be one of the prohibited reasons.
4. **Section 298K (2)** a person must not, for a prohibited reason, **or for reasons that include a prohibited reason**, do or threaten to do any of the following:
- a. **TERMINATE A CONTRACT FOR SERVICES THAT HE OR SHE HAS ENTERED INTO WITH AN INDEPENDENT CONTRACTOR** - The conduct must amount to a clear termination, or threat of termination, of the relevant contract. Conduct which results in a change in the terms of, or manner in which the contract is administered may fall into 2(b) or (c) but will not be covered by 2(a) unless the change is so profound as to render it virtually impossible for the independent contractor to comply with its obligations such that there has been a constructive termination.

**Proof is necessary of:**

1. The existence of a contract for services (whether oral or in writing) between the first person (the principal) and the independent contractor;
2. The first person has threatened (and if a company that a representative has threatened) to terminate the contract or has in fact terminated the contract. This evidence may be a combination of both written and

verbal communications. It may even be that in some cases the threat or termination may be inferred from the circumstances.

b. **INJURE THE INDEPENDENT CONTRACTOR IN RELATION TO THE TERMS AND CONDITIONS OF THE CONTRACT FOR SERVICES**

**Proof is necessary :**

1. To establish the existence of the contract (whether oral or in writing);
2. The terms and conditions of that contract. In the case of a verbal contract it will be very important to ascertain from the complainant ( or a representative), and particularise, details of the term and conditions. If the contractor has been dealing with the principal over a period of time this will no doubt assist in establishing the nature of their contractual relationship.
3. The nature of the injury (note what has been said earlier in paragraph 1(b) about injury in relation to employees).
4. Link the action (or threat) of the principal to the injury ( potential injury).

c. **ALTER THE POSITION OF AN INDEPENDENT CONTRACTOR TO THE INDEPENDENT CONTRACTORS PREJUDICE**

**Proof is necessary:**

1. To establish that the person is an independent contractor, the evidence in this regard will usually speak for itself.
2. Establish either directly or by inference that the position of the contractor has been prejudiced. In considering prejudice refer to what has been said in relation to 1(c) of this section.
3. Link the prejudice to the action of the principal.

d. **REFUSE TO ENGAGE ANOTHER AS AN INDEPENDENT CONTRACTOR-** The position here is similar to refusal to employ and ordinarily we would need to prove that there was a clear opportunity for the independent contractor to be engaged by the relevant principal at the time of the alleged threat or refusal. However, in the matter proceedings of the EA v Abigroup and others the threat by Abigroup was in the followings terms:

*“Alright you’re stuck on this job and we’ve given you a contract to be on this job, but you won’t get another job. And that’d be for any other job.....”*

Counsel in that matter advised that it was open to argue that the comments of Abigroup amount to a refusal to engage Carson on any future job notwithstanding there is no particular job on offer at the time of the threat.

e. **DISCRIMINATE AGAINST ANOTHER PERSON -** Discriminate against another person in the terms or conditions in which the person offers to engage the other person as an independent contractor – see previous comments in relation to 1(e).

5. **Prohibited Reasons** [Only the more common reasons are commented upon]

1. Section 298L (1) Conduct in s298K is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned {the "other person" refers to the person in 1(d) and (e) and 2 (d) and (e)}:

- a. is, has been, proposes to become or has at any time proposes to become an officer, delegate or member of an industrial association the term officer is defined in *section 4 of the Act*. It has been held that a "delegate" must have been appointed to the position in accordance with the organisations rules and that it is not sufficient that the person performs the functions of the delegate without the approval of the organisation see *Stapleton v African Lion Safari and Plumpton v Cathay Hotel Pty Ltd*. In relation to "member" it has been held (see *Burgess v John Connell-Mott, Hay and Anderson Pty Ltd*) that where an employee alleged he was dismissed because of his union membership it was not sufficient that he held a current union ticket, he must be entitled within the terms of the constitutional coverage of the union to be a member of that union.

Where an employer changes production techniques and this gives rise to a change of union coverage so that employees who wish to remain a union member change union membership this will not amount to a breach. Further if the change in production techniques leads to the termination of employees who happened to be unionists again no breach occurs. see *Causer v Austral Bronze*. However, if the termination of employees occurs such that only union members are terminated then such conduct will more than likely amount to a breach.

Where an employer dismisses a troublesome shop steward (delegate) because of his or her propensity to stir up trouble this is likely to contravene the section see *Cuevas v Freeman Motors Limited*. However, it does not mean that a shop steward who is troublesome and who is a troublemaker generally cannot be dismissed or disciplined see *Northrop.J in Heidt v Chrysler (Australia) Ltd*.

In *Linehan v Northwest Exports Pty Ltd*, the defendant argued that the employee was dismissed not because of non-membership but to avert an industrial dispute however *Ellicott .J said* that non-membership was an operative factor and drew a distinction between a person's "object" and his "reason" for acting in a particular way.

- b. Is not, or does not propose to become, a member of an industrial association - there are two distinct options here:
1. the person is not a member; or
  2. the person does not propose to become a member ie the person has indicated by word or deed that they do not wish to join the union in question.
- c. In the case of a refusal to engage another person as an independent contractor:
1. has one or more employees who are not, or do not propose to become, members of an industrial association; or



2. has not paid, or does not propose to pay a fee (however described) to an industrial association;

Clearly this prohibited reason relates only to conduct referred to in s298K (2). Further it relates only to a refusal to engage and not a decision to terminate an independent contractor.

Although the onus (see s.298V) is on the person alleged to have refused to engage the independent contractor it would be prudent to have gathered evidence that in fact the independent contractor does have employees who are not or do not propose to become members of the relevant industrial association or alternatively that the said independent contractor has not paid or does not propose to pay a fee of the kind described.

- d. Has refused or failed to join in industrial action

It seems that here there are two aspects "refusal" connotes some positive act on the part of the employee, independent contractor or other person whereas "failed" connotes something more passive on the part of the relevant person.

- e. Entitled to the benefit of an industrial instrument or order of an industrial body. The term "*industrial instrument*" is defined in s298B (1) to mean an award or agreement, however designated that is made under or recognised by an industrial law and concerns the relationship between an employer and an employer's employees or provides for the prevention or settlement of a dispute between an employer and employers employees. An "*industrial body*" is defined in the same section to mean the Australian Industrial Relations Commission or a Court or Commission however designated exercising under an industrial law powers and functions corresponding to those conferred on the Commission by this Act.

This prohibited reason extends to both an employee and an independent contractor who is entitled to the benefit of an instrument or order. It has been held (see *Leontiades v FT Manfield Pty Ltd*) that the expression "entitled" involves the existence of an enforceable legal right.

- f. Has made or proposes to make any enquiry or complaint to a person or body having the capacity under an industrial law to seek:
  1. compliance with that law; or
  2. the observance of a persons rights under an industrial instrument.

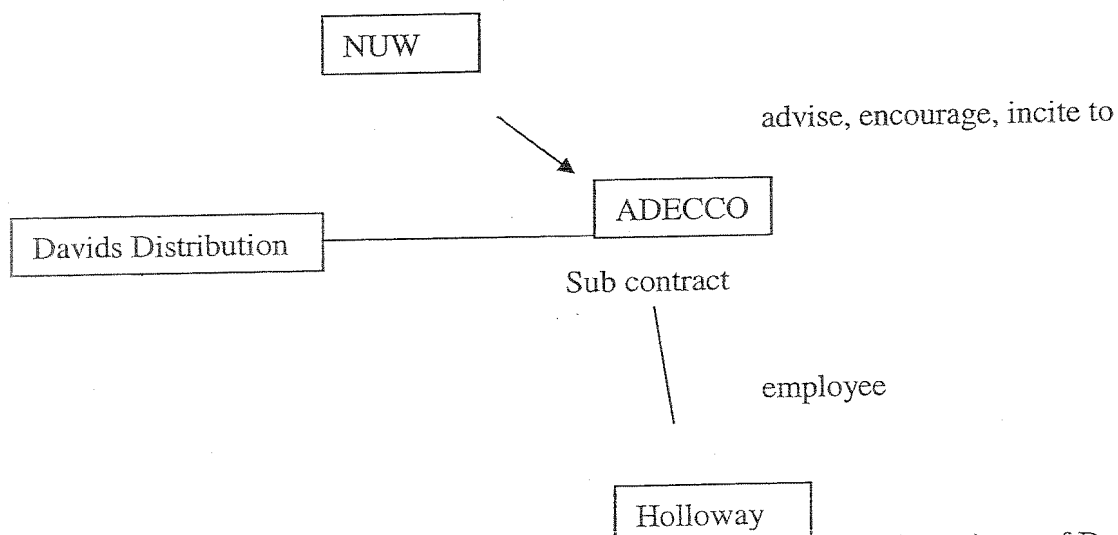
"*Industrial law*" is defined in s298B (1) to mean an act or a law, however designated, the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees. An example of a person or body of the kind referred to would be an inspector appointed under the Act or the Employment Advocate.

An example of such a case is *Employment Advocate v Atlas Pty Ltd*. which is presently before the Federal Court in Perth. In that case an employee made a complaint to the OEA about a proposed variation to his AWA. The employer it is alleged, upon becoming aware of the complaint withdrew a privilege from the employees namely the right to share in the proceeds of the sale of scrap from the plant.

## 6. Section 298P(3)

Section 298P(3) provides: "An industrial association, or an officer or member of an industrial association, must not:"

- a. advise, encourage or incite an employer;
  - generally common sense meaning of these words
  - advice etc must be directed at the employer of the employee(s) who will suffer the injury which is prohibited in 298K
  - advice etc should show what injury the union wanted the employer to cause (eg dismiss, not engage, alter employee's position)
  - Encourage or incite are synonymous. Encourage has been defined as "to intimate, to incite to anything, to give courage to, to inspire, to embolden, to raise confidence, to make confident" see Isaacs.J in Australian Commonwealth shipping Board v Federated Seamans Union (1925) 35 CLR 462.
  - According to Isaacs and Starke .J J encouragement is a broad notion and can be inferred from silence.
  - Incitement may occur by threats, the application of pressure or persuasion see Race Relations Board v Applin [ 1973] QB 15. Persuasion may also be implied.eg ARWOOD

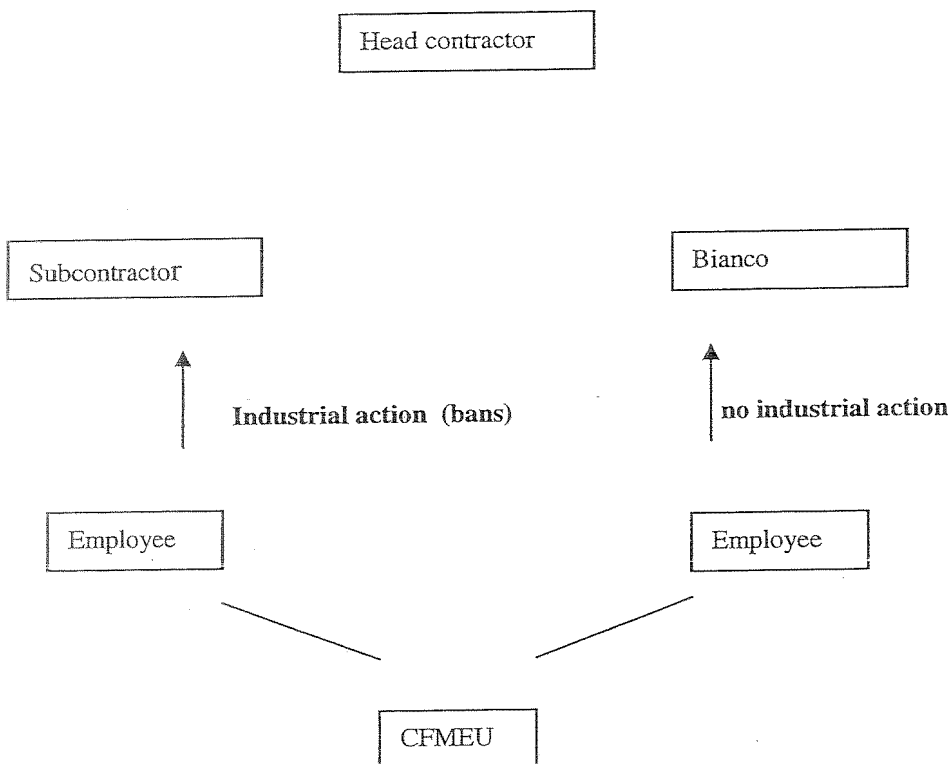


NUW advises ADECCO to take action "... pull (Holloway) out of Davids warehouse...", which if taken, would have contravened s298K.

b. **organise or take, or threaten to organise industrial action against an employer with intent to coerce the employer:**

- difference of opinion on this –
- Accepted view - must be industrial action by the **employees of the employer** who is being coerced to take the prohibited action
- Other view says it can be industrial action taken by **any employee** against the employer who is being coerced into taking prohibited action. (QRX and Arwood)

Accepted view – 298P(3)(b)



In the Bianco matter, the CFMEU organised and its members who were employed by a number of subcontractors on a building site, imposed bans (industrial action) to prevent the delivery of materials to Bianco who was another subcontractor, because, amongst other things, some of his employees were not union members.

None of Bianco’s employees imposed bans. The direct effect of the bans was on the employers of the members who took the bans. The bans were only indirectly against Bianco.

To be caught by 298P(3)(b), the industrial action must be by the employees against their employer, the employer being the one who is coerced to take the prohibited conduct.

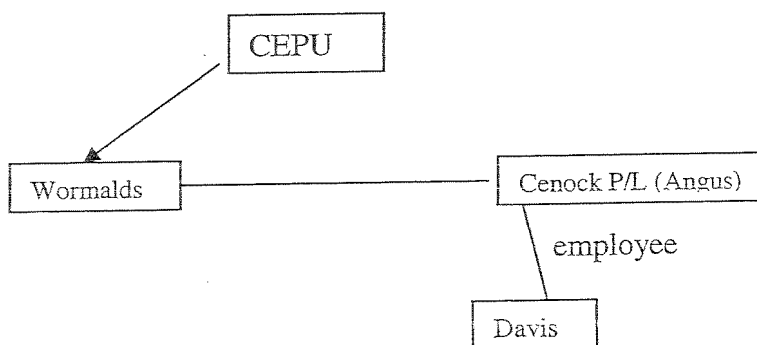
(Note that, had the parties been negotiating a CA, this conduct would probably have been in breach of s170NC).

- c. to take action in relation to a person that would, if taken, contravene s298K.”
- for both (a) and (b) we must obtain evidence of what the union was requiring the employer to do in s298K (dismiss, injure etc). Although it may be apparent from the words or deeds of the union representative what the consequences is or is likely to be for the relevant employee.
  - action need not have been taken by the employer, it only requires that the action **would**, if taken breach 298K- see Dimozantos v R (1991) 56 A Crim R 345 at 349: Ansett v Australian Federation of Air Pilots (1989) 95 ALR 211 at 249..
  - best if it is direct evidence of what union wants the employer to do.
  - If no direct evidence, employer may ask union organiser some questions to get the info eg:
    - “This action is being taken against my company because it employs non-union labour, isn’t it? (response)
    - “What do you want my company to do?” (response)
    - “Do you want me to sack the employees who are not in the union, or not give them site allowance or what?”

#### 7. Section 298(S)

Section 298S(2) is in the following terms: “An industrial association, or an officer or member of an industrial association, must not:

- a. **advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person because the eligible person is not a member of an industrial association; or”**
- discriminatory action – refuse to use or agree to use or refuse to supply or agree to supply to an eligible person
  - eligible person – person who is eligible to join a union or would be eligible if he was an employee
  - eligible person cannot be a corporation or an employee



In the ANGUS matter, the CEPU advised encouraged and incited Wormalds to refuse to make use of the services of Davis because he was not a member of the union.

However, this provision was not applicable in the above case as the employer who is being incited is a corporation. The scenario would have worked had the employer been an independent contractor. The incitement was for Angus not to use the services of Davis because he was not in the union.

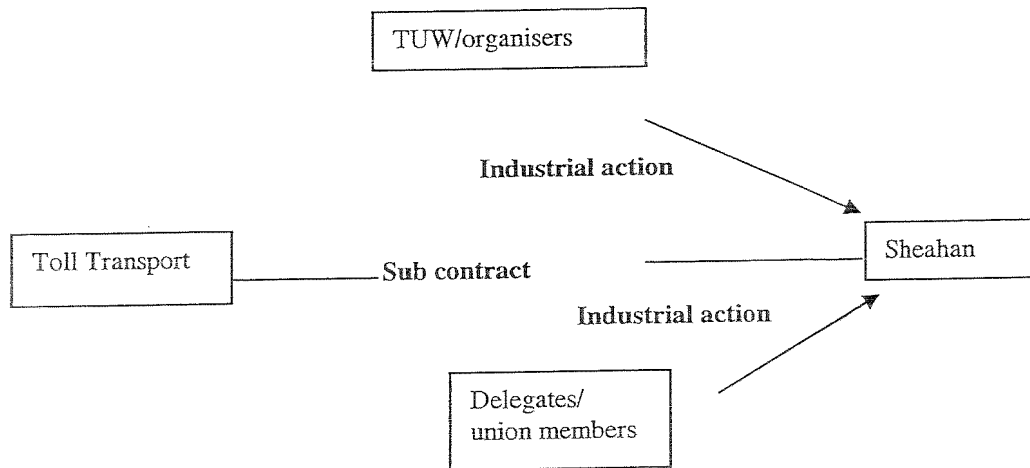
**b. “ take, or threaten to take industrial action, against an employer with intent to coerce the employer to take discriminatory action against an eligible person because the eligible person is not a member of an industrial association; or”**

- the requirement is for the union to take industrial action against an employer to coerce the employer to take discriminatory action– (broader definition of industrial action in Part XA used)
- Note - an eligible person cannot be a corporation or employee

**c. “ take, or threaten to take, industrial action against an eligible person with intent to coerce the person to join an industrial association.”**

- Eg. The QRX case – which involved a refusal to allow subcontract drivers to enter the depot
- Intent to coerce drivers to join union was evident from statements made by the organizers and QRX staff who were union members.
- Note - an eligible person cannot be a corporation or employee

In the Toll matter the TWU organizers and delegates took industrial action (bans/go slow/walkout) against an independent contractor driver (Gary Sheahan) which delayed him in getting unloaded and loaded. He also lost other work because of the delays.



**8. Section 298V - Reverse Onus**

Where an allegation of proscribed conduct is made , then by virtue of the provisions of s.298V the respondent carries the onus of proof and will have to establish, on the balance of probabilities, that the conduct was not carried out for an unlawful reason or intent. The onus applies in applications for both interlocutory and final relief *see Patricks case.*

As to the extent of the burden, in *Webb v. Nationwide (1985) 10/IR/252* Wilcox J, in reference to a similar requirement arising out of s.5 of the

Conciliation and Arbitration Act 1904 (CTH) said "it is not enough merely to show that there also existed non-prohibited reasons. The prohibited reason must be negated."

There are some other judicial comments in relation to s298V worth noting. Firstly, Gibbs. J (as he then was), in *General Motors Holden v Bowling* in relation to the predecessor to s.298V [ie s 5 (4)] said:

"There is no special difficulty in the way of an employer who seeks to prove under s5 (4) of the Act that in dismissing an employee he was not actuated by the fact that the employee was a shop steward or other delegate of a registered organisation. The onus of proving that the fact that the employee held the position of shop steward was not a substantial and operative factor in the dismissal is to be discharged according to the balance of probabilities, and is not to be made heavier by any presumption that if an employee who is dismissed for disruptive activities happens to be a shop steward, the latter the circumstance must have had something to do with his dismissal. If in the instant case evidence had been given by the Directors responsible that the employee was dismissed because he was guilty of misconduct or because his work was unsatisfactory and that in dismissing him they were not influenced by the fact that he was a shop steward or indeed that he was dismissed in spite of that fact, and that evidence had been accepted, the onus would have been discharged."

Next the comments of the Full Federal Court in *Mayne Nickless Ltd v Transport Workers Union of Australia and Others* (a judgement being delivered on 16 July 1998) where Black CJ, Von Doussa and Carr JJ. in dealing with an appeal from a decision of Ryan J made the following comments:

"Moreover, the findings made by Ryan J were made in the context of a statutory presumption in favour of the employees in circumstances of a termination (see s298V). His Honour found – and this lies at the heart of the matter that the presumption had not be displaced by the contested evidence adduced on behalf of the appellant."

Finally the decision of Mr Justice North in *National Union of Workers v Davids Distribution Pty Ltd* (a judgement delivered on 1 December 1998) where his Honour made the following comment:

"Once the union alleged that David's acted for the prohibited reason, a presumption was raised by operation of s298V that David's did act for that reason unless David's proved otherwise."

### Points of Proof – s285E (1)

1. S285E (1) provides as follows:
 

"A person exercising powers under s285B or s285C must not intentionally hinder or obstruct any employer or employee":
2. The exercising of powers under **s285B** or **s285C** is limited to a person issued with a permit pursuant to **s285A**. So in any investigation we should ensure, and be in a position to prove by admissible evidence that the person suspected of a contravention has in fact been issued with a permit that is current. The means of proof is a record or certificate with the seal of the Registry on it. S.65(4) allows such a document to be admitted into evidence without further proof of the seal.

**Section 285B** permits an official who suspects a breach of the Act or an award, order or certified agreement that binds the organisation of which the official is an employee or officer to do certain things. The official may :

- enter, during working hours, premises where employees (who are members of the union) work for the purpose of investigating the suspected breach;
- upon entry the official may:
  - require the employer to allow the official to inspect and copy certain records kept by the employer on the premises being records that are relevant to the suspected breach;
  - interview (during working hours) employees who are members or eligible to be members.
- even if no entry is effected the official can still require the employer to produce documents.

**Section 285C** permits the official to enter premises where work is being carried on to which an award, binding on the official's organisation and employees who are members or eligible to be members, applies. Entry must be during working hours and discussions must be held during meal or other breaks.

3. In any investigation of a contravention of s285E (1) we should ascertain whether or not the relevant union official has some right/entitlement to entry under an Award/Agreement or under relevant State legislation, whether it be industrial relations legislation or occupational health and safety legislation (s.127AA), which says that right of entry clauses in awards are not enforceable, does not apply to certified agreements). An official may have a permit issued under state legislation. If there is even slight evidence that an official may be able to rely upon an award/agreement or another Act to justify their presence we will need to be in a position, if necessary, to negate any such claim.
4. While it is not entirely free from doubt the preferred approach to the section is that a person who purports to exercise powers under s285B or s285C (so long as the person holds a permit) would be caught by the section. *For example the permit holder may not give the employer any notice prior to entering the site and may not specifically indicate they are exercising the relevant powers however if their conduct permits an inference to be drawn that they are in fact exercising such powers then the section is likely to apply.*
5.
  - a. In exercising powers under either s285B or s285C the permit holder has to comply with the provisions of **s285D** in that the person is:
    - required to show their permit if requested to do so – s285D (1)
    - required to give the occupier of the premises 24 hours notice of the intention to come onto the site. The issue of a "seven day" notice has arisen on occasions and advice from AGS is that unless a time is specified with reasonable particularity the requirements are not met. What is reasonable will depend on the circumstances and in the view of AGS a particular day or days need to be specified. The AGS do acknowledge that the practice of weekly notice could be held to conform with the section. However, a notice that does not specify an end date is likely to be held to be invalid on the basis of uncertainty.

- b. If 24 hours notice was given was it verbal or written? If verbal, we need to obtain an accurate statement, from the site representative who received the notice as to what was said. If a record of the conversation was made in a site diary etc we should have the site representative refer to the diary entry and annex an extract of that entry to any statement. {ensure you read the diary entry carefully so that you can, if necessary, canvass with the site representative any issue arising from such entry}

If notice was given in writing we should annex a copy of the relevant letter to the statement of the relevant representative of the occupier.

- c. Does the notice specify who and when? Does this accord with what actually occurred? If not elaborate? Did the notice state the reason for entry was to exercise powers under s285B or s285C? If s285B – what did the official actually do when he/she came onto the site – was it conduct consistent with the investigation of a suspected breach of the Act etc.

If it was an exercise of powers in accordance with s285C when did the person enter the premises? Was it during working hours? Were discussions held with employees? Were those discussions during meal times or other breaks?

6. We will need to identify, by admissible evidence, the premises in question and identify the occupier (s) of the said premises. An issue that remains to be determined is whether one site may in reality be one or more than one premises. We are considering this issue and will keep you informed.
7. The conduct that might constitute a contravention of s285E (1) must be conduct by a natural person. So that any relief sought ie injunction and/or fines will be against that individual and not the union of which that individual is an official.
8. The conduct must be **intentional** – whether it was or was not is something that will, in ordinary circumstances, be inferred from the words and deeds of the “person” who is alleged to have conducted themselves in contravention of the section.
9. **Hinder/obstruct** - admissible evidence will be required as to what the particular official did or said which is alleged to amount to hinder/obstruct. In addition admissible evidence should be obtained in appropriate cases, of the consequences, if any, attributable to the words/deeds of the said official for example *a concrete pour was stopped or the site closed etc.*
10. It is not necessary that the hindering or obstructing of an employer or employee by an official be “direct”. (See Mason C J in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 45–46).

The most obvious case of obstruction or hindrance will be a physical act by an official but more subtle actions can equally amount to obstruction or hindrance. Lord Goddard C J in *Hinchcliff v Sheldon* {1995} 1 WLR 1207 at 1210 said “obstruction” meant making it more difficult for a person to carry out his duties. Mason CJ in the *Devenish* case said that “hinder” meant in any way affecting to an appreciable extent the ease of the usual way of supplying the article. Further his Honour says, (dealing with similar expressions in the Trade Practices Act) there is no reason to reject a broad interpretation of the word “hinder”. Lockhart and Gummo JJ in *BLF v J-Corp* {1993} 114AR551 at 559 said “hinder” should be construed to mean in any way affecting to an appreciable extent the ease of



an employer or employee going about their usual business. Further it has been said that obstruction does not necessarily need to involve personal conduct by act or speech and that conduct which is essentially negative in character may, in certain circumstances, constitute obstruction - see *O'Reilly v Commissioners of the State Bank of Victoria (No.2)* (1983) 83 A.T.C 4156 at 4163.

11. The difference between "obstruction": and "hindrance" would appear to be slight indeed.
12. **Any employer** – requires admissible evidence to identify that the person or entity who it is alleged has been hindered or obstructed is an employer ie we will need to link the act or acts which constitutes the alleged hinder or obstruct to the particular employer in question.
13. **Or employees** – where the allegation is hinder or obstruct any employee we will need to identify, by admissible evidence, that the person or persons who have allegedly been hindered or obstructed are in fact employees ie we will need to link the act or acts that constitute the alleged hinder/obstruct to the said employee or employees.
14. We should also ascertain whether or not the alleged contravention occurred at a time when the employees (and their industrial association) were engaged in protected action against their employer. If so the provisions of s170MT may, subject to the exceptions in s.170MT(2)(a) to(c), provide the official with a good defence to any alleged contravention of s285E (1).
15. **Remedies:** S.285F provides the avenue for seeking penalties and also obtaining injunctions in respect of conduct that allegedly contravenes s285E(1).

### *Admissibility of evidence*

Cases that reach Court depend upon witnesses taking the stand and providing evidence which is both relevant and admissible.

In some circumstances, a statement will form the basis of an affidavit to be used in Federal Court proceedings. Therefore, it is essential that statements include everything that may later be presented, in accordance with the rules of evidence.

#### **Relevance**

To be relevant, evidence must prove or disprove a disputed fact. An OEA statement may include facts which are helpful to inform the investigation, but are not relevant to Court proceedings. Any unnecessary information in the statement should be excluded from an affidavit. The only facts which should be included in the affidavit are those which:

- constitute the offence, or
- explain the facts which constitute the offence.

In evidence, the facts which may be proven are:

- the facts in issue : These are the facts required by law to establish the offence, i.e. the elements of the offence.
- the facts relevant to the issue : These are the facts which are not directly at issue, but help to support the contention that the respondent did or did not commit a particular offence. An example of a fact relevant to the issue is an entry in a visitor's book. This entry proves the fact that a person was a

visitor to a work site on a particular day. It may support the fact that this person may have breached a section of the WRA, but it does not prove it.

### **Hearsay evidence**

With certain exceptions, hearsay is evidence given by a person:

- about something which that person did not perceive himself or herself
- which that person has received as second hand.

Hearsay evidence may relate to both oral and documentary evidence.

Hearsay evidence is unreliable and inadmissible for the following reasons:

- evidence based on a statement by another person cannot be tested in cross-examination of the witness
- experience suggests that few persons are capable of giving an exact account of what was said to them by another.

The main exception to the hearsay rule that is relevant to CSN Officers is that statements adverse to the maker's case i.e. admissions, are received as proof of the truth of their contents in civil and criminal proceedings. Inspector's interviews with defendants/respondents will usually be accepted into evidence. This evidence will usually be given by the Inspector reading out the interview or tendering the document in the proceedings.

In taking original statements, you should err in favour of including hearsay evidence, in order to ensure that all information which may be relevant to the case is brought to the attention of other members of the investigation team.

Including hearsay in statements may lead to the discovery of other evidence, which is admissible. Care must be taken to ensure all hearsay is removed from statements at the time they are converted into affidavits. This will be done in conjunction with a solicitor.

### **Character evidence**

Character refers to the reputation or general credit in which a person is held.

Character evidence is not admissible because it is often highly prejudicial and is of little probative value.

### **Opinion evidence**

As a general rule, opinion evidence is not admissible because it is the function of the Court to form its own opinion.

However, Section 76 of the Evidence Act allows expert opinion from witnesses who have relevant specialised knowledge.

### **Who is competent to give evidence**

As a general rule, a person with first-hand knowledge of the facts is competent to be a witness. People who may not be deemed to be a witness include:

- people who have significant intellectual disability
- people who have significant psychiatric disability or
- people who are otherwise demonstrably unable to understand that they are under an obligation to give truthful evidence. This may include children.

If you suspect that a person giving evidence falls into any of the above stated categories you should discuss the issue with your manager and legal officer.

### *Corroboration*

Corroborative evidence is independent evidence which confirms or supports other evidence of the same fact.

As a general rule a fact may be proved by a single witness, but it is of vital importance for CSN Officers to be aware of the desirability of obtaining evidence from a number of sources to prove a fact. For example, a complainant's complaint of coercion to sign an AWA may be corroborated by rosters or payslips which show that the complainant's hours of work have been reduced. Also, another work colleague may have heard the employer threaten to reduce the complainant's hours unless they signed the AWA.

### *Discovery*

Discovery is a procedure used in civil cases. This procedure allows a party to require the other party, with notice, to disclose all documents which relate in some way to a matter in issue between them.

A document is discoverable if it would lead to some inquiry which will either advance a party's case or damage that of the other party. The discovery procedure is set out in the relevant court procedure.

There are limits to discovery and these include:

- privilege against self-incrimination
- legal professional privilege
- privilege on the grounds of public interest.

The EA or an inspector as a complainant or respondent to a court action may use this process and have this process used against it. All documents of relevance, including computer records, can be required through this process.

### *Proceedings*

In civil cases, proceedings are initiated by the filing and serving of two documents:

- an 'Application', and
- a 'Statement of Claim'.

These documents must be served in accordance with the relevant court rules.

The Application will set out a date for a Directions hearing during which a timetable for pre-hearing procedures is set out.

Prior to the court hearing, witnesses must be proofed (ie taken through their evidence) to determine how good they are likely to be in court. In saying this, regard to the credibility of a witness should be given at all stages of the investigation of a matter.

### *Giving evidence and Court appearances*

Officers, in particular CSN Officers, can expect to be called to the witness box.

The defence's objective is to do harm to the evidence. A CSN Officer may support his or her evidence through contemporaneous notes, i.e. file notes taken throughout the investigation.

It is important to listen to questions carefully and provide clear, accurate and concise answers. Do not go beyond the question with your answer. If you do not understand the question, ask for the question to be re-phrased.

Refer to the Judge as "Your Honour", "Sir" or "Madam". Refer to Counsel as "Sir" or "Madam" or by name if this is known, e.g. "Mr Brown", "Ms Brown".

You should be suitably dressed for Court. No officer should go to Court without a jacket. Men should wear a business suit. Women should wear clothes of a similar standard.

### *Statements by Inspectors*

In all matters where litigation is commenced in the name of the applicant Inspector, that Inspector is required to prepare a statement setting out the history of his or her involvement in the matter and the process followed in bringing proceedings.

The statement may be converted into an affidavit (with the assistance of solicitors) prior to proceedings being commenced. Additionally, the applicant Inspector may be required to give evidence as set out in the statement or affidavit.

In relation to the process leading to proceedings being commenced in the applicant Inspector's name, the statement should include words to the effect that:

"The investigation process was in accordance with the OEA's normal procedures which involve the Inspector gathering evidence with advice and input from the relevant manager or solicitor."

Once the evidence gathering is completed, then advice is sought from that Legal Officer. The Legal Officer may seek advice from Counsel at this stage.

Once that advice has been obtained, the Inspector is then in a position to make a recommendation, based on the advice obtained, to the Senior Legal Manager. That recommendation is endorsed by the relevant Legal Officer normally in consultation with the Inspector's relevant manager. If the Senior Legal Manager accepts the recommendation, then the Legal Officer proceeds to prepare the initiating documentation.

The recommendation must deal with the issue of voluntary compliance and have regard to the criteria for making legal applications.

### *Australian Securities and Investments Commission Extracts*

Australian Securities and Investments Commission (ASIC) searches are an essential tool in many investigations and may be used to identify potential respondents.

Information shown on an extract of an ASIC record includes:

- the registered name of the company

- the registration number
- the registered address of the company
- the date of registration
- the Directors and Directorships
- managers
- shareholders.

The OEA holds an account with ASIC for searches that are done over the internet.

When planning an investigation, you should consider whether an ASIC search on a company should be done.

## Interviewing witnesses

### *Types of witnesses who may be interviewed*

Interviewing witnesses involves asking questions of parties who may have knowledge of, or information related to, the matter you are investigating.

Types of witnesses you may need to interview include:

- the complainant
- any witnesses to the matter you are investigating
- expert witnesses who may provide expert evidence on a matter
- potential respondent(s).

When interviewing witnesses, it is important to identify:

- the relationship of the witness to the complainant and the respondent(s)
- whether the witness is a genuinely independent witness.

The importance of independent witnesses cannot be over-emphasised. Independent witnesses are vital if the matter proceeds to Court. Generally, the evidence provided by an independent witness carries more weight than the evidence of a witness with a vested interest in the outcome of the proceedings. For this reason, you should do your utmost to locate independent witnesses wherever possible.

### *Powers of Authorised Officers and Inspectors to interview*

In your capacity as an Authorised Officer or Inspector you have limited powers to interview persons in certain circumstances.

These powers are defined in:

- Section 83BH of the *Workplace Relations Act 1996* (WRA) for Authorised Officers

The WRA usually provides the power to interview persons available for a “compliance purpose” only. A “compliance purpose” can be defined as a matter, inquiry or investigation that falls within the EA’s jurisdiction as defined by the WRA and the Workplace Relations Regulations.

## *Section 86 of the WRA for Inspectors*

Note that as an Inspector, you only have powers to interview employees.

### *Approaching witnesses*

It is important for you to be aware that potential witnesses may be extremely sensitive about where and when they are approached. It is possible that a potential witness may want to discuss issues with you, but may be apprehensive about retribution if they are seen to be cooperating with the OEA.

Therefore, it is important that you are discreet about approaching potential witnesses in the workplace. Alternatives are to speak to the potential witness during a meal break, at home after work hours or at other venues.

### *Initial interviews*

In most cases an initial interview is usually conducted with the complainant on the telephone. At this time, you are gathering information to decide whether there is a prima facie breach worthy of further investigation. If you are on site (possibly exercising your powers under Section 83BH and Section 86 of the Act), then the initial interview would be conducted face to face.

After the initial interview, you will be able to decide whether to contact other possible witnesses to establish whether they are able to provide relevant evidence. It is preferable to conduct any interviews face to face, instead of by telephone. Witnesses are more likely to provide better evidence if a rapport can be established between the interviewer and the interviewee.

It may not be possible to conduct initial interviews face to face if the interviewees are located in a regional area.

In any case, it is important to conduct initial interviews as soon as practicable.

In some cases, it may be appropriate for a number of CSN Officers to make the initial approach to a number of potential witnesses simultaneously. This will avoid the possibility of one witness alerting others to the investigation, thus providing an opportunity for evidence to be concealed or fabricated.

### *Preparing for an interview*

Preparation for an interview is essential. Before any interview you should be able to explain clearly why the person has been approached for an interview and what evidence you believe to be potentially available.

#### **Discuss the interview**

Discuss the proposed interview with your manager. In consultation with your manager, determine the number of CSN Officers who need to attend and where the interview should be held.

#### **Gather and analyse all information relevant to the interview**

As part of preparing for an interview, ask and answer these questions:

- Why should the interview be conducted?
- Who will be interviewed and in what order?

- Where will the interview be conducted?
- When will the interview be conducted?
- Have you obtained as much background information as possible? Ensure that:
  - you are sure of all the facts
  - you understand the WRA
  - you are aware of all documents that have been obtained or may be obtained
  - you are conversant with the industry.
- Have you clearly defined the object or purpose of the interview?
- Have you mapped out a plan for the interview?
- Have you listed all the questions that need to be answered? This list should not prescribe the questions asked at the interview, but should be used as a guideline.
- Is an interpreter required for the interview? Refer to *Use of interpreters* for information on using an interpreter.

### **Prepare the Investigation Plan**

Make sure that you prepare an Investigation Plan for matters that are likely to involve numerous witnesses or that may become protracted.

It is important to analyse the chronological order in which you speak to witnesses, as this could have an impact on the amount of information you can obtain.

Refer to *Creating an investigation plan* for detailed information on preparing an Investigation Plan.

### *Use of interpreters*

You must use an interpreter if the complainant, witnesses or respondents do not speak English well enough to provide accurate responses to your questions.

Using an interpreter:

- ensures procedural fairness
- is required if the record of interview is to be tendered to the Court as an exhibit. The record of interview may not be admissible if an interpreter was not used.
- is a logical tool to assist you to communicate with the interviewee.

You can source interpreters through various agencies such as the Translating and Interpreter Service (TIS). You must book the interpreter in advance.

Because the use of an interpreter is a cost to the OEA, you must obtain authorisation from your manager before you make the booking.

As an alternative to an interpreter, you can use another person who is fluent in the language of the interviewee. Such a person must:

- be an independent person. They must not be directly related to any of the parties involved.

- supply you with a statement about their involvement in the investigation, if required.
- understand that there is a possibility they may be called to provide evidence before a Court, depending on the type of matter being investigated.
- interpret exactly what the interviewee says without altering the translation in any way.

When an interpreter has been used to obtain a statement or during a record of interview, he/she should also make a declaration at the end of the statement or record of interview. For the wording of the statement, click [here](#).

## *Rights of the interviewer and interviewee*

### **Rights of the interviewer**

The interviewer has the right to ask questions.

The interviewer does **not** have the right to:

- compel answers
- be abusive or threatening.

### **Rights of the interviewee**

The interviewee has the right to the benefit of:

- administrative law and principles of natural justice
- principles of procedural fairness.

It is important that these rights are strictly applied when interviewing respondent(s).

## *Guidelines for conducting the interview*

This section contains guidelines you must be aware of when conducting interviews.

### **Interviewing witnesses separately**

If you have multiple witnesses to interview, it is very important that you interview each witness separately.

This ensures that each interviewee provides their independent recollections and is not influenced by what another interviewee may say.

For the same reasons, do not keep a group of witnesses in the same room. You can either separate the witnesses into separate rooms or have enough CSN Officers available to speak to each witness simultaneously.

### **Ensuring that a witness is not led**

It is crucial to the value of a person's evidence that they be allowed to give it with as little prompting or assistance as possible. You can facilitate this by:

- only providing the interviewee with a broad description of their role in the investigation. Do not provide the interviewee with any specific details.
- asking open-ended questions to elicit information.



- encouraging witnesses to use their own words to describe events.

### Cautioning a witness

All interviewees must be clearly informed of:

- the role of the OEA
- the purpose of the interview
- what the information obtained during the interview may be used for, and
- the potential use of a statement as evidence in Court proceedings. The interviewee must give their evidence knowing that it may be used in Court.

If you are interviewing someone who may have been involved in a breach of the WRA and who may possibly become a respondent in Court action, you should caution them.

The appropriate words to use in a caution are:

“I wish to interview (or continue to interview) you (or ask you questions or obtain a statement) however, I must caution you that you are not obliged to say anything unless you wish to do so. Anything you say may be recorded and given as evidence in Court. Do you understand that?”

### Interviewing someone with a “special disadvantage”

During any interview, you must be mindful of the rights of the interviewee.

In particular, if you are interviewing someone who has a disability or special disadvantage, you need to carefully consider how this may affect the interviewee and, therefore, the veracity of the evidence provided.

Examples of people who may have a special disadvantage include those:

- for whom English is a second language
- with intellectual or psychiatric impairment
- on medication
- who feel pressured from any source to give evidence
- who may be a potential respondent to the allegations
- who are under 18 years of age.

If you are interviewing someone who may fall into any of these categories, you should:

- Offer the opportunity for the interviewee to have someone present at the interview. This may be a friend, work colleague or lawyer.
- Make a file note that the opportunity was offered, and how the interviewee responded.
- If the opportunity is accepted, clearly explain the role of the support person. This must be done at the commencement of the interview. In most cases, the role of the support person is limited to support only. The support person has no right to continually interrupt your questioning. It is the interviewee who has the prerogative to decline to answer questions. If a solicitor is present, they may advise their client, but must not interfere in the interview.

## *Making a record of the interview*

### **Purposes of a record of interview**

Where you are dealing with a co-operative witness, i.e. not the potential respondent, who is willing to make a statement, that is the preferred option for recording their evidence. Where you are not sure of that outcome, you need to make a record of the interview.

The purposes of a record of interview are to:

- record the information obtained during an interview
- record anything of significance or any incidents which may occur during an interview
- record anything which cannot be entrusted to memory
- provide a permanent record of the interview
- assist with determining whether or not breaches of the WRA may have occurred and what actions may be appropriate
- form the basis of statements in Court or Tribunal proceedings
- refresh your memory of an interview when providing evidence during Court or Tribunal proceedings.

The objective of the notes you take during an interview is to allow another person to pick up the file and fully understand the case.

Click [here](#) to view a ROI template which illustrates the required format.

### **Taking notes during the interview**

Notes must be taken contemporaneously with the interview. If you can't record your notes at the time of the interview, make sure they are recorded as soon as practicable afterwards while the facts are still fresh in your memory.

Make sure your notes are clear and accurate.

Your notes must clearly explain what was heard, and should be recorded in the "I said", "he/she said" format.

Your notes must record only facts. They must not, for example, record your guesses or interpretations about what was said. Ensure that the following types of information are accurately recorded:

- times and dates
- name and addresses of people
- lists of items for evidence.

Follow these guidelines for setting out your notes:

- to make a correction, draw a single line through the incorrect word and then make the correct entry;
- use all the lines on each page and use the pages consecutively;
- rule off every entry;
- do not have blank spaces.

All interview notes must be kept. They must be taken in a form such that they are able to be transcribed at a later time and can be Right FAXED into COMS.

### Adopting the notes

If another CSN Officer is present at the interview for which you have taken notes, you should have the second officer sign or initial the notes as being an accurate record.

The adoption of the notes should include a date and time.

### Using a tape recorder

Tape recorders can be useful in making notes of an interview.

After an interview, you can dictate your recollection into the tape recorder. When the contents of the tape are transcribed, you must ensure that the typed version states that this is the text of a tape recording made immediately after the interview.

If you want to use a tape recorder to tape a conversation or interview, you must discuss the proposal with your manager.

Tape recording equipment which is prominently displayed is permitted in accordance with legislative constraints within each State/ Territory. In determining whether any such tape recording is permitted by legislation, advice must be obtained from OEA legal staff.

Use of tape recording equipment which is concealed will be allowable **only in exceptional circumstances** in accordance with the legislative constraints *and then only with approval of the EA*.

In addition, if advice is sought from CSN Officers by parties to a complaint as to whether they should use such concealed equipment to record conversations, those parties should be advised to seek their own advice. The advice as with all conversations should be file noted and placed on COMS.

## After an interview

### Assessing a complaint based on the interview

As a result of an interview, you will need to consider the impact of the evidence you have obtained. With the assistance of your manager, you must continually assess whether a complaint or enquiry should proceed or be discontinued.

For example, if an interviewee raises evidence contrary to the complaint, or challenges the complainant's creditability, you must reassess the case. This should be done in consultation with your manager.

### If the complaint appears to have substance

If the complaint appears to have substance, you should attempt to gather any supporting evidence. Such evidence may include:

- letters detailing previous complaints dealt with internally by the respondent
- documents which provide evidence of any external grievance process taken by the complainant
- names and availability of any witnesses to the event(s) which are the subject of the complaint
- recent statements from any witnesses.

Once you have obtained all available supporting evidence, you should re-assess the complaint again. If the investigation is to continue, the complaint should be put to the respondent at this stage.

## Obtaining statements

### *Who provides statements?*

Statements are taken from witnesses.

A witness may be:

- a person who witnessed the commission of a breach of the WRA
- a person who can help establish one or more elements of an offence
- a person who can corroborate evidence
- a person whose evidence is essential to the proceedings
- an expert witness
- a complainant.

Statements are taken from OEA CSN Officers, including:

- the CSN Officer involved in the case
- any other CSN Officer whose testimony can assist in the prosecution, or whose evidence can corroborate the case officer's evidence.

A statement may be taken from a potential respondent (although it is preferable to interview such a person formally on audio tape). Both are dependent on the co-operation of the potential respondent.

### *Preparing the statement*

The objective of the statement is to present information in a logical sequence to enable the lawyers or the Court to see clearly and logically what has occurred.

CSN Officers should include as much relevant information as possible when taking a statement, notwithstanding that some of the information may at a later stage be excluded as being inadmissible. Legal Section will make this determination if proceedings are initiated.

It is always preferable that a statement is typed. However, in some circumstances a handwritten statement may be acceptable.

An [OEA statement template](#) is available online.

### *Taking the statement*

Make sure the witness is fully briefed and prepared for the process. Minimise interference with the witness's personal or professional affairs.

Organise a suitable appointment which will ensure adequate time and minimal interruptions.

Allow the witness to tell their story without interruptions. Take the written statement only after all relevant information has been elicited.

Where possible, prepare the statement and have it signed at the time of the interview. In some circumstances, it may be preferable to take notes, then prepare the statement from the notes and any other documents at a later time. Examples of when this may be preferable include when taking a statement from the Managing Director of a large company or where the statement will be complicated and lengthy.

## *Parts of a statement*

### **Employment / Job Details**

The witness's employment or job details should be stated in the third paragraph of the statement after the jurat and age. The witness must provide the following information:

- where they are employed, including the name and address of their employer, e.g. Coles New World Supermarket, Shop 57 Belconnen Mall, Belconnen, ACT, 2614.
- a job description, e.g. Shop Assistant.

### **Preamble**

The preamble includes facts which lead to the main points or body of the statement. The preamble sets the scene.

For example, in a matter concerning industrial action, the preamble may include information about where the picket lines were set up and what the picketers were carrying. It may also contain information about where the witness was, what the witness was doing, times and dates.

Note that when times or dates are mentioned in a statement, other than in conversation, the practice is to write them in this format: 9.45am on Monday 10 March 2001.

### **Body**

The body of the statement includes the main points recorded in the sequence that they occurred. The proofs of the offence are included in the body.

The body also includes any conversation which occurred between the witness and the respondent and details of what the witness saw.

Note that when any conversation is included in a statement, the actual words of the conversation are included. Separate the conversation from the text. For example:

I said:

“Would you please show me your permit?”

He said:

“Here is my valid permit (permit produced). I would also like to speak to the staff during their lunch hour.”

If the witness has difficulty recalling the precise words used in a particular conversation, include the following paragraph in the statement:

“The words used in the conversations referred to in this statement (or affidavit) may not be the exact words used in the said conversation. To the best of my recollection they accurately reflect the substance of the conversation(s).”

### **Conclusion**

The conclusion of the statement covers any points not previously covered. It should bring the statement to its natural conclusion.

As an example, in a 170NC matter the conclusion could include the cost incurred by the complainant in not being able to continue with the concrete pour because of strike action.

If there is a possibility that the matter being investigated could fall under the jurisdiction of another agency, e.g. ACCC, then include a clause which gives permission for this statement to be used as evidence by the external agency.

### **Signature block**

The signature block is placed at the foot of the statement.

The signature should be witnessed by the CSN Officer taking the statement. The date, time and place at which the statement was taken is also recorded.

If the statement is more than one page long, each page should be signed by the witness and the CSN Officer. The statement template accommodates this requirement.

### **Errors in a statement**

If there are any errors in the statement, you should draw these to the attention of the person making the statement.

If corrections are made to the hard copy of the statement, the witness must initial them.

If corrections are made to the electronic version of the statement (i.e. on the laptop computer), then the original statement should also be printed and treated as an exhibit.

### **Exhibit production**

The statement template provides a facility to note the production of exhibits. A standard statement is included. For example:

*Annexed to this (affidavit/statement/statutory declaration) and marked with the letters (LSA - initials of the person providing the exhibit and a sequential letter or number) for identification is (the CEPU cheque refunding my union fees - description of exhibit).*

EXHIBIT      I PRODUCE THE CEPU CHEQUE - LSA

### **Paragraph numbering**

Paragraphs in a statement are numbered for ease of reference. Paragraph numbering is automatically created by the statement template.

## Induced statements

Taking an induced statement will not occur very frequently. Before you obtain an induced statement, you should:

- seek advice from the CSN Manager North/South and
- obtain approval from the Deputy Employment Advocate, CSN.

Approval for an induced statement will only be given in certain circumstances, for example, where the witness has crucial evidence and may also have breached the WRA, but only in an inadvertent or minor way.

The inducement must be recorded at the beginning of the statement and should be in the following terms:

“I am making this statement after a promise held out to me by (*name of OEA officer giving inducement*), an Authorised Officer appointed by the Employment Advocate, that no information given in it will be used by the Employment Advocate in any proceedings brought pursuant to the provisions of Part XA of the WRA against me in any court of law, except in respect of the falsity of my statement or for the purpose of establishing the falsity of evidence given by me as a witness.”

You must ensure that the person providing the statement clearly understands that the statement:

- will not be used against him/her in relation to any proceedings under Part XA
- may be used in relation to other persons who may have breached Part XA.

Note that in its current form, this statement may only be used for breaches of Part XA of the WRA. For other breaches, e.g. Part VIIIA (strike pay breaches), the statement must be modified and approved by Secretary DEWR or his delegate.

## Affidavits

Affidavits must be used in Federal Court proceedings.

Usually, affidavits will be prepared by Legal Officers and finalised by Counsel. The affidavit is based on statements or other evidence provided by CSN Officers.

In some circumstances, generally in urgent cases, CSN Officers or other staff may need to prepare affidavits. When preparing an affidavit, it is important to remember that it is the evidence of the witness to be given in Court. You must adhere to the rules of evidence and admissibility. Refer to *Admissibility of evidence*.

An [OEA affidavit template](#) is available online.

## Handling exhibits

### Collecting and handling exhibits

The existence of exhibits which are handled correctly and are admissible may make the difference between a successful prosecution and an unsuccessful one.

You should collect exhibits when:

- it is considered highly probable that the matter will result in Court proceedings, or
- the matter may lead to Court proceedings AND the exhibit is currently in the hands of someone who has no interest in the success of the proceedings.

If Court proceedings are unlikely, or the exhibit is in the keeping of someone who does have an interest in the success of any proceedings, identify the exhibit and arrange for it to remain in situ until the matter is resolved.

All exhibits must be admissible in accordance with the provisions of the Evidence Act 1995. An exhibit cannot be tendered in evidence just because a witness refers to it in a statement.

An exhibit should be handled by as few people as possible to assist in ensuring the continuity of the exhibit.

Where an exhibit is seized by a CSN Officer, a receipt should be provided to the person from whom the exhibit was obtained. Click [here](#) to see an example of a receipt.

### *Types of exhibits*

The most common types of exhibits you may encounter are:

- documents obtained under Sections 83BH and/or 86 of the WRA
- an original type-written statement taken from a witness. This may occur particularly if the final affidavit is signed some time after the initial statements were taken.
- other documents, including computer-generated documents, e.g. company searches, letters, business cards, union official registers, memos, trade magazines
- AWAs, certified agreements, awards and contracts
- photographs of items, locations or people, etc.
- tape recordings of interviews, etc.
- video recordings, news broadcasts, etc.

### *Handling documentary exhibits*

All original statements should be lodged as exhibits.

Photocopy the originals to use as working copies.

Place all original documents in plastic sleeves to preserve them and avoid any damage.

If you copy the documents and return the originals to their source, ensure that you have the copies certified as true copies.

### *Handling other types of exhibits*

If you have a large exhibit, e.g. a banner hanging from a building, you can photograph the exhibit in situ and tender the photograph as evidence.



Any other item that either corroborates a witness's evidence or assists with "painting a picture" to the Court should also be lodged as an exhibit.

Take care with photographs and ensure that they do not stick together.

Any items such as a map or a photograph must be adopted by a witness who will verify that it is a true and accurate representation.

### *Handling video and audio recordings*

Ensure that you do not store any tape recordings near heat, in sunlight, or near any magnetic field as this may damage the tapes.

The following procedure shall apply when transcription services (e.g. Auscript) are required:

- copy the original tape to another blank tape
- forward the duplicate copy to be transcribed
- do NOT send original tapes.

If you send the original tape, it may be damaged, and the continuity of the exhibit is compromised. Further steps will be required to establish the continuity of the exhibit, resulting in more work.

If you plan to tender a videotape as an exhibit, you must have the tape adopted as a true and accurate representation of events. This should be done by someone who was present when the videotape was made, e.g. the camera operator. Alternatively, the tape can be adopted by a person who is qualified to state that the representation is accurate.

If you plan to tender a recording from a static or surveillance camera, where no operator is actually watching what is being recorded, you must have an expert witness available to testify about the operation of the equipment.

### *Continuity of exhibits*

Continuity of exhibits is imperative as this aspect of an investigation may be challenged in any Court proceedings.

The onus is on you to prove continuity. If you cannot prove continuity, the exhibit will be regarded as inadmissible by the Court and cannot be tendered in evidence. This may result in an unsuccessful prosecution.

The general principle is to allow exhibits to be handled by as few people as possible.

If you pass property to anyone, ensure you obtain an indemnity receipt from them. This ensures that the possession of the exhibit can be established at all times. Click [here](#) to see an example of an indemnity receipt.

### *Storing exhibits*

You should keep possession of any exhibit you have obtained until you can store it in a secure designated storage receptacle. This should be done as soon as possible.

The storage receptacle must be lockable and must be used for exhibit storage only. The Regional Manager or a CSN Officer should hold the key to the exhibit receptacle.

### *The Exhibit Register*

When you place an exhibit in the exhibit receptacle, you must note this in the Exhibit Register. The register is to be maintained by the Regional manager. This register is also kept in the exhibit receptacle.

These details are entered into the Register:

- the time, date and place the exhibit was obtained
- the name of the person from whom the exhibit was received
- a detailed description of the exhibit
- the reason the exhibit was obtained, and brief case details
- the relevant CFN
- the name and signature of the investigating/responsible officer lodging the exhibit.

When property is returned to the owner:

- ensure you obtain an indemnity receipt
- attach the indemnity receipt to the Exhibit Register at the relevant entry
- draw a diagonal line across the entry to clearly indicate that it has been finalised.

The Exhibit Register and exhibit receptacle should be inspected at least quarterly to ensure that items related to finalised matters are returned or removed.

Be aware that the Exhibit Register may be used in future Court proceedings.

**Example of Exhibit Register index**

| Exhibit Number | Description                      | Page Number | CFN   | Comments  |
|----------------|----------------------------------|-------------|-------|-----------|
| RD-1           | Tape recording                   | 10          | 11125 |           |
| SR-10          | Letter from employer XYZ Pty Ltd | 12          | 33333 | Copy only |

**Example of Exhibit Register page**

Page 10

| Exhibit Number | Description    | Date in & signature    | Date out & signature | CFN   | Comments                           |
|----------------|----------------|------------------------|----------------------|-------|------------------------------------|
| RD-1           | Tape recording | 14/8/00<br>OEA Officer |                      | 11125 | Taped conversation with Joe Bloggs |
|                |                |                        |                      |       |                                    |

**Example of an indemnity receipt**

**RECEIPT**

A.G.S.  
Adelaide Street,  
Brisbane, QLD. 4064.

17<sup>th</sup> November 1999

RE; OEA MATTER – XYZ TOWNSVILLE  
CONTACT OFFICER – OEA Officer PH: 32231388

I hereby acknowledge receipt of the following :-

**Documents:**  
*Personal diary for Fred Smith*  
*Personal note book of Tom Jones such notebook containing entries prior to 10/3/99.*

Received from OEA Officer C/- OEA on 17/11/99

..... ./.../2001

Name & signature

## Witnesses

### Responsibility for witnesses

Where an investigation may lead to Court proceedings, you are responsible for the management of witnesses. This responsibility may include:

- maintaining contact with the witness until the matter comes to Court
- making any arrangements necessary for the appearance of the witness, e.g. travel, accommodation, briefing with Counsel.

You should also make an assessment of the witness's motivation. This may be helpful in assessing the veracity of the information provided by the witness, and also in retaining their co-operation throughout the investigation and any subsequent Court proceedings.

The best way to ensure that witnesses will deliver their testimony is to make the process of appearance as easy as possible.

### Obtaining evidence from the witness

It is important to obtain all available evidence from the witness at the time of the investigation and to keep it in a secure place. For information on storing evidence, refer to *Storing exhibits*.

Have the witness provide a statement which contains the testimony they can be expected to give. This statement will later form the basis for an affidavit. Provide a copy of the statement to the witness.

If the witness has any other type of evidence, e.g. photographs, sound recordings, documents or notes taken at the time, you should sight these and introduce them as exhibits in the witness' statement. If possible, obtain the original items, secure them and, if appropriate, provide the witness with a copy. If you can't obtain the originals, obtain a certified true copy.

### Maintaining contact with the witness

It is essential to confirm the identification of witnesses when obtaining their evidence. Wherever possible, identify a backup contact arrangement, e.g. through work, home or a close contact.

You must maintain contact with the witness until they are required to appear in Court.

You should telephone the witness about once every six months to keep the witness informed of the progress of the case, even where there has been "no progress". This will also enable you to keep the witness's contact details up to date.

### Managing Court appearances

When the witness is to appear in Court, you must ensure that the witness knows what to expect and how they are to proceed.

You must advise the witness of:

- how the Court will be conducted, how they ought to present themselves in Court, and, if required, how to address the presiding judge

- any arrangements which have been made for a briefing by Counsel
- any travel or accommodation arrangements that have been made for the witness.

Where necessary, witnesses can be compensated for any travel or accommodation costs in accordance with OEA travel allowance arrangements.

The CSN Officer should also ensure that the witness refreshes his or her memory prior to giving evidence. This can be done by providing the witness with a copy of their statement. The witness will also be required to meet with Counsel prior to the hearing to discuss their appearance.

### *Summoning a witness*

It is OEA policy to summons/subpoena all witnesses for appearance.

One effect of that policy is that they can point to the court requirement if they are concerned about repercussions of voluntarily appearing as a witness.

## Undertaking surveillance

In some circumstances it may be considered useful to undertake either observations of a workplace, or wider surveillance activities.

Before any surveillance activities can be undertaken, you must obtain the approval of either the Deputy Employment Advocate, CSN or CSN Manager North/ South. These senior managers will obtain the approval for surveillance from the EA.

Regional Managers are responsible for any surveillance activities undertaken in their regions.

## Managing client aggression

### *Description of unacceptable client aggression*

Client aggression means unacceptable or hostile behaviour. Such behaviour may lead to situations which are intimidating, frightening, offensive or unsafe.

They may also adversely affect your ability to perform your work effectively and efficiently.

### *Principles for managing client aggression*

Managers will provide you with support when handling difficult or aggressive clients.

Your responsibility is to provide a professional service at all times. The following principles will assist:

- remain objective and do not provide personal views.
- the factors which were considered when a decision was made should be clearly stated to the affected person. Where possible, this information should be conveyed by the decision maker.

- where a decision is provided in writing, the name of a contact officer should be provided so that the client has someone to contact if they wish to discuss the decision further.
- you should make every effort to put the client at their ease, and discussions should only be terminated after all such attempts have failed.
- if a person's behaviour is unacceptable and is interrupting your ability to provide services to other clients, you should:
  - seek the assistance of a more senior officer, if appropriate, or
  - ask the person to leave the premises.
- if a person is aggressive on the telephone, and is preventing you from providing services to other clients, you should advise the person that the conversation will be ended. You can then hang up the phone.
- if you are planning a workplace investigation, check the information on the file for any history of violence or aggression. If such a history exists, inform your Regional Manager before the visit. It may be appropriate for another officer, or the manager, to accompany you on the visit.

### *Offence provisions*

You should keep in mind the provisions of Sections 305 and 305A of the WRA when confronted with client aggression.

Section 305 deals with the following offences:

- hindering or obstructing an Inspector
- contravening an Inspector's requirement without reasonable excuse
- knowingly making a false or misleading statement to an Inspector.

Section 305A deals with the following offences:

- hindering or obstructing a person known to be an Authorised Officer
- contravening an Authorised Officer's requirement without reasonable excuse
- knowingly making a false or misleading statement to an Authorised Officer.



## Chapter 7: AWA investigations

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### Overview of handling AWA complaints

Complaints about AWAs can be categorised as either:

- complaints during agreement making, i.e. duress or additional approval requirements, or
- complaints regarding alleged breaches of existing AWAs.

In handling AWA related investigations, regard should be had to the procedures set out in prior chapters of this manual.

It should be noted that, as with other types of complaints, AWA complaints may be received through a number of avenues, including through the NTAS, directly through the Regional Office, in writing or via the internet e-mail service.

It may be that many complaints will be resolved at, for example, the NTAS level.

### Complaints relating to AWA filing or approval requirements.

#### *Receiving the complaint*

When a complaint is received, the CSN Officer will attempt to resolve the matter by providing advice and assistance over the phone.

If the matter cannot be resolved, the CSN Officer will:

- determine the status of the relevant AWA
- enter a communications work item (case note) on WorkDesk describing the nature of the allegation

If a complaint is received from a Bargaining Agent on behalf of a complainant, it must be accompanied by the complainant's written authorisation of the Agent's appointment.

On the day of receipt of the matter, the CSN Officer will refer the matter to the Regional Manager for assessment of what action should be taken. Details that the Regional Manager will require from the CSN include

- details of the case status
- name of the Case Officer, if allocated
- relevant WorkDesk communication work items (case notes)
- any other details, as required.



### *Taking appropriate action*

The CSN Officer and the Regional Manager, in consultation, will decide how to investigate the complaint.

The investigation may include obtaining statements and documents from the complainant and relevant witnesses. This may involve the need for a site visit. Again it is important to note that the procedures set out in this manual, including the chapters relating to powers and responsibilities of Authorised Officers, voluntary compliance; investigation and case management; are all relevant to the handling of AWA matters.

At an appropriate point in the investigation, the employer / potential respondent will be approached and given the opportunity to respond to the complaint. This may occur at the beginning of the investigation, if appropriate. It is a key objective that the OEA attempts to quickly resolve matters. The correct time to approach the employer is assessed on a case-by-case basis.

If the complainant's details are to be revealed to the employer, you must obtain written consent for this disclosure from the complainant. If written consent cannot be provided for a compelling reason, such as, for example, geographical isolation, you should seek advice from the CSN Manager North / South.

### *Handling the affected AWA*

It is crucial that the CSN Officer handling the matter keeps all relevant staff (in particular the processing team) informed of the status of the complaint and the progress of the investigation via email and during staff meetings.

The AWA to which the complaint pertains must not be finalised until the investigation has been completed. AWAs for other employees of the relevant employee can be finalised only if the matters raised in the complaint do not affect them.

If appropriate, the complainant should be advised of his or her right to withdraw the AWA.

### *Communicating within the OEA*

The CSN Officer who has been tasked with the investigation must:

- provide regular updates to the Regional Manager, Legal Officer and Manager, National AWA team, on the progress of the investigation.
- record all information received during the investigation, including notes about site visits, in COMS.
- ensure all information obtained is entered as a communication work item (case note) in WorkDesk

### *Outcomes*

#### **If the complaint is not substantiated**

If there is insufficient evidence to substantiate the allegation:

- advise the complainant of the outcome
- advise the employer of the outcome

- record the outcome on COMS and WorkDesk
- proceed with the AWA approval process as normal

#### **If the claim is substantiated**

If there is sufficient evidence to substantiate the allegation:

- make a recommendation to the relevant Regional Manager that the AWA be refused
- after consultation with the Regional Manager and the Legal Section;
  - advise the complainant of the outcome
  - advise the employer of the outcome
  - record the outcome on COMS and Workdesk.

If there is sufficient evidence of a breach of Part VID or other part of the WRA, the CSN, in conjunction with the Legal Section, will consider what appropriate action should be taken.

## Complaints about a breach of an existing AWA

### *Receiving the complaint*

If you receive a complaint about an alleged breach of an AWA, you must determine whether the complaint relates to an actual breach, or whether it should be considered as an internal workplace grievance.

For example, payment of wages, which are less than provided for in the AWA, would be a breach of an AWA. However, dissatisfaction with the application of a company policy may be a grievance, but not necessarily a breach of an AWA.

To determine whether the complaint relates to an actual breach, you will need to compare the information provided by the complainant with the contents of the AWA.

If the complaint is not an AWA breach matter, it may be appropriate to refer the complaint to another agency. For example, you may, with the consent of the complainant refer:

- a health and safety complaint to the relevant state or territory occupational health and safety authority
- a discrimination complaint to the relevant Commonwealth, State or Territory anti-discrimination authority.

Again, the consent and referral needs to be documented on COMS.

### *Resolving a complaint at workplace level*

Where possible, it is desirable that disputes are resolved within the workplace without the intervention of third parties. This is in line with the principal objective of the WRA.

The WRA provides a framework for co-operative workplace relations by:

- ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employers and employees at the workplace level
- providing a framework of rights and responsibilities for employers and employees which provides fair and effective agreement-making and ensures that they abide by awards and agreements applying to them.

### *Dispute resolution procedures*

AWAs are required to contain a dispute resolution procedure. If the AWA does not contain a dispute resolution procedure, the model dispute resolution procedure contained in the WRA is deemed to apply.

Advise complainants that they should try to resolve their complaint through the dispute resolution procedure in their AWA.

### *Legal action*

If a complaint cannot be resolved by following the dispute resolution procedure, complainants may wish to pursue legal action.

Legal action can be taken in a Magistrates, or a District, County or Local Court. An individual may seek damages arising from the breach and/or recover wages from the employer. The Court may also impose a penalty of up to \$10,000 for a body corporate or \$2,000 for an individual.

#### **Small claims**

Section 179D of the WRA sets out a small claims procedure that may be followed in actions for recovery of wages where the amount involved is less than \$10,000.

This procedure must be adopted by the Court in dealings with small claims if the claimant so wishes. The small claims procedure has several advantages over other forms of action, such as:

- it is generally much quicker, cheaper and less formal than higher court proceedings
- neither party is represented by a barrister or solicitor, unless permitted by the court
- formal rules of evidence do not apply and claims are decided on the balance of probability.

A small claims kit for each State and Territory has been developed by the Legal section of the OEA to assist applicants with relevant documentation and forms that will be required to lodge a small claim and should be provided to the Complainant.

Please click on [to view the documents](#).

The Small Claims Kit should be provided to a complainant if they are to lodge a claim.

Consideration should be given to the extent of assistance that will be given to the Complainant in putting together the claim. Please note that because of the user friendly nature of the small claims jurisdiction and the limited resources of

the OEA, any further intervention, other than assisting the party in putting the claim together is unlikely to be considered. The Complainant should be advised of the extent of assistance that will be provided. This advice should be confirmed in writing on provision of the Small Claims Kit in order to avoid any misunderstanding as to the extent of assistance to be provided.

### *Investigating AWA breach complaints*

#### **Memorandum of Understanding with DEWR**

In summary an MOU between the OEA and DEWR for the provision of advisory, compliance and education services in relation to the application of the *Workplace Relations Act 1996* (“the Act”) and *National Code of Practice for the Construction Industry* (“the Code”) was signed in December 1997. The MOU is to be regularly review by the parties.

Pursuant to that MOU there is an agreement between the Employment Advocate and the then secretary of DEWR in relation to the prime responsibility of the OEA and the DEWR respectively in relation to certain parts of the Act.

In particular in relation to breaches of AWAs it was agreed that, to facilitate investigation of these breaches, a number of DEWR officers would be appointed as Authorized Officers under the Act.

In summary, under part 3 of the MOU, the OEA deals with all initial inquiries in relation to alleged breaches of AWAs. Because of the considerable expertise and experience within the office of Workplace Services (OWS) in DEWR in dealing with award breaches, the OEA **may** refer cases to designated OWS officers for investigation. The MOU states that referred cases will be treated in a similar way to alleged award breaches and in a manner that is consistent with OWS policies and procedures. It states that the investigations will be subject to OWS’s performance and client servicing standards. The MOU allows that, if the alleged breaches can be sustained, the OWS will make all reasonable efforts to seek voluntary compliance.

In line with good customer service, where possible, all matters relating to breaches of the OEA should be investigated by the OEA as opposed to referral under the OEA.

Matters may be referred to OWS, subject to Regional Manager approval, under the following conditions:

- Where, subject to the operational requirements of the section (for example an unusually high workload has been received by a Regional Office) the CSN does not have the capacity to deal with a matter

And /or

- Where the Regional Manager forms the view that a matter is better dealt with by the OWS because of the complexity of the matter.

The reason for the referral must be documented on COMS.

The Complainant must be advised that the matter is being referred to the OWS along with contact details in OWS. Regular contact with the OWS must be maintained throughout the handling of a matter to ensure that a matter is progressing.

Click [here](#) to view the contents of MOU.

**On receipt of a complaint, the officer handling the matter should ask the following questions:**

- Is the person alleging a complaint covered by an AWA? Be sure to establish the person's identity before confirming the existence of an AWA.
- Is the person aware of the dispute resolution procedures available under the AWA, and if so, have they been followed to their conclusion?
- Is the substance of their concern a breach of an AWA condition or is it a matter of an internal workplace grievance or unrelated to the AWA, e.g. a health and safety issue?
- Is the person aware of the courses of action available, i.e. small claims, other agencies (if applicable)?
- If there appears to be a breach of the AWA, is the employee seeking help from OEA in investigating the alleged breach?

Again it is important to note that the procedures set out in this manual, including the chapter relating to powers and responsibilities of Authorised Officers, voluntary compliance; investigation and case management; are all relevant to the handling of AWA matters.

### **Referring a complaint to DEWR**

Inline with the above stated procedure, decisions as to whether to refer a matter to DEWR are to be taken in conjunction with the Regional Manager. Decisions as to referral should be taken bearing in mind workload and the complexity of the matter.

Where a complaint is to be referred to DEWR, you should assist the complainant to fill out the complaint form. Click [here](#) to access a copy of the form. This form is modelled on the DEWR Wages and Conditions Claims Form.

To refer the complaint to DEWR, follow the procedures in the MOU.

# Chapter 8: Code site inspections

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## Overview of Code site inspections

The role of the OEA is to provide information and advice to client agencies, and their contractors, on the industrial relations elements of the Code.

OEA officers carry out Code activities in their capacity as officers of the DEWR responsible to the Secretary or his or her delegate. For normal operational purposes the delegate is the Senior Legal Manager.

When involved in Code activities, you are acting as an officer of the DEWR not acting as an Inspector under Sections 85 and 86 of the *Work Place Relations Act 1996* (WRA). Also, officers are not acting in their capacity as Authorised Officers pursuant to Sections 83BG and 83BH of the WRA.

## Roles and responsibilities

### *Responsibilities of the OEA*

The responsibilities of the OEA are to:

- conduct proactive site inspections
- assist with information seminars or presentations about the Code
- conduct investigations of alleged breaches.

In conducting these activities the emphasis is on:

- sharing information with client agencies
- educating about compliance with the Code
- providing evidence to the Code Monitoring Group (CMG) about alleged breaches.

It is the CMG that has responsibility for ensuring compliance with the Code.

### **Responsibilities within the OEA**

Regional Managers have responsibility for:

- creating the planned program of Code site inspections, in conjunction with the CSN Manager North/ South, the Senior Legal Manager, the OEA Code Manager and CMG.
- Providing input for the OEA Code Manager to complete a quarterly report to the CMG about Code inspection activities.

The Senior Legal Manager is the OEA representative to the CMG. The OEA Code Manager and a nominated Legal Manager assist the Senior Legal Manager in this role. This includes the provision of training and advice about Code matters, as well as acting as liaison points for complex Code matters.

### *Responsibilities of CMG*

The responsibilities of the CMG are to:

- provide an updated list of all known Code sites to the OEA every three months. The OEA, in conjunction with CMG, uses this list to create the site inspection program.
- review and endorse a planned schedule of Code projects to be inspected
- refer any alleged breaches of the Code to the OEA for investigation. These referrals must be made in writing to the Senior Legal Manager.
- provide a regularly updated list of all Code information sessions it has conducted or intends to conduct.

## Conducting Code site inspections

### *When are Code inspections conducted?*

The OEA conducts inspections of Code sites:

- as part of the planned program of Code site inspections
- at the specific request of a client agency or CMG Secretariat
- in response to an allegation of a breach of the Code.

If the OEA receives a complaint of a breach of the Code, it will inform the CMG of the complaint details in writing.

### *Determining the planned inspection program*

The planned program of inspections includes sites which are selected to:

- seek to ensure that at least four Code sites nationally are visited each month
- include a mixture of high, medium and low value projects
- include a geographical spread of sites
- take into account the attitude and history of a client agency, builder or other involved party
- give priority to sites which are at an early stage of development
- include projects with a variety of trades and contractors on site
- take into account other factors, in particular advice from the CMG Secretariat.

### *Inspection methodology*

Follow this process when conducting Code site inspections:

1. Advise the Client Agency that a Code site inspection will be conducted within a specified timeframe. Note that an inspection cannot be carried out without the consent of the Client Agency.

2. Request all required information and documentation. In particular, inspect the standard contract documentation (and if necessary, the Deeds of Grant) to determine if the Code is a particular contractual requirement. Determine if a project agreement is approved for the site.
3. Collate the collected information into the Code Inspection Report.
4. Approach the Project Manager (if one has been appointed by the Client Agency) and request the information and documentation required by the Code Checklist. In particular, a copy of the head contract is required.
5. Approach the contractors on site and request the information and documentation required by the Code Checklist. You will need to:
  - interview the site manager/supervisor
  - interview OH&S officers and induction officers
  - obtain copies of, and examine relevant documents (such as any sub-contracts, tender requirements, successful and unsuccessful tendering correspondence, site registration and induction register, sub-contractor contact list, tender questionnaire and possibly site diaries). Note should be taken of differences between standard documents and those actually in use
  - conduct a site inspection which may include discussions with workers.
6. Approach the sub-contractors/employees (as required) and request the information and documentation required by the Code Checklist. You will need to seek information about:
  - the actual application of the Code on site, and
  - whether any person or organisation has subjected them to pressure that may constitute a breach of the Code.
7. Produce an OEA internal report for assessment by an OEA legal officer and the OEA Code Manager.
8. With input from the OEA Code manager report to the Client Agency. If necessary, request the Client to take action to rectify non-compliance with the Code and to enforce the contractual obligation to comply with the Code.
9. Report through the OEA Code Manager and the Senior Legal Manager to CMG.

### *Reporting to the CMG*

The OEA through the OEA Code Manager will submit a written report on all programmed Code site inspections and a planned program of visits 7 days prior to each CMG meeting.

The OEA will submit written reports on all investigations of alleged Code breaches to the CMG as soon as possible after the investigation.

Information which must be included in reports to the CMG is described in Procedural Steps for Considering Breaches of the National Code of Practice for the Construction Industry and Industry Guidelines.

The CMG will make any requests for additional information, documents or reports in writing, and will specify the nature of the required additional material.



## *Tools for use in inspections*

Use the following tools to ensure that inspections are conducted consistently and information is collected uniformly:

### Code Procedures Checklist

This provides a checklist of procedures that must be followed when conducting inspections. It is designed to assist you to check that all required steps have been carried out.

### Code Inspection Report

This report is completed when an inspection has been completed. It is designed to assist you with the completion and collation of all relevant matters raised during an inspection. This report, and relevant documents, is submitted to OEA management.

### OEA Standing Report

This report is submitted by the OEA to the CMG at each regular meeting. It is designed to provide concise details of OEA activities conducted since the previous meeting.

These reports may be supplemented by other reports and documents dealing with specific allegations of breaches.

## Related documents

To obtain further information about the Code and the procedures for Code activities, consult the following publications:

- National Code of Practice for the Construction Industry
- NCP Industry Guidelines
- NCP Implementation Guidelines
- NCP Guidance for Agencies
- Procedural Steps for Considering Breaches of the National Code of Practice for the Construction Industry and Industry Guidelines

## Darwin to Alice Springs Rail Project

The OEA fulfils a similar role in relation to the Alice Springs to Darwin Railway project. This particular project occupies a special position in that while the National Code applies, it does not fall under the immediate authority of the CMG. Rather, there is a joint Commonwealth/State government committee chaired by an independent person. That Project Code Monitoring Group (PCMG) undertakes the monitoring for compliance with the Code. The OEA reports to that Group (although, unlike the CMG, the OEA is not a representative of the Group). The OEA officer responsible for submissions to the PCMG is the Senior Legal Manager.

The OEA's field activities are conducted in a similar fashion to regular Code work.

## Chapter 9: Handling complaints

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### Relevant OEA service standards and policy

#### *OEA Service Charter*

The OEA Service Charter details the standards to be applied when dealing with clients.

Click [here](#) to view the OEA Service Charter.

#### *OEA Complaints Procedure*

If a client is aggrieved by the standard of service provided by the OEA, the client may make a formal complaint.

The OEA has a formal complaints procedure which is followed when dealing with a client complaint.

Click [here](#) to view the complaints procedure.

### OEA Responsibilities

If you receive a formal complaint about any OEA staff member, including yourself, you must advise your manager and the CSN Manager North/ South and/or the Deputy Employment Advocate, CSN. If the complaint is about a senior staff member, then the matter should be reported to a more senior OEA manager.

When you are dealing with a dissatisfied client, you must recognise the client's rights to:

- express their concerns
- have a matter investigated thoroughly and fairly.

It is also important to recognise that complaints provide the OEA with the opportunity for feedback and to make improvements where necessary.

## The Commonwealth Ombudsman

### *Referring a complaint to the Ombudsman*

In some circumstances, a client may wish to lodge a complaint with the Commonwealth Ombudsman.

Before a complaint is referred to the Ombudsman, you should encourage the client to have the matter dealt with by the OEA so that it may be resolved internally. You should not recommend the referral of a complaint to the Ombudsman until every reasonable attempt to resolve the matter internally has been made.

The Ombudsman may decline to investigate a complaint if it has not first been investigated by the appropriate agency.

### *What the Ombudsman will investigate*

The Ombudsman will investigate the following issues in relation to a complaint:

- whether a legislative provision or an administrative process or practice upon which a decision is based is unreasonable, unjust, oppressive or discriminatory
- why a matter has been delayed or why an agency has failed or refused to take action
- whether the way in which officers performed their duties was appropriate, taking into account issues such as unfair treatment, rudeness and neglect
- whether the investigating officer has advised the client of other possible avenues for remedy, and when this advice was provided. Officers should always advise parties that they have the option of taking their own legal action or seeking private legal advice.

### *Powers of the Ombudsman*

The Commonwealth Ombudsman has the power to:

- obtain relevant documents. The request is made in writing and the documents must be supplied within 28 days
- require a person to appear before him or her
- enter Commonwealth premises to inspect documents.

The Ombudsman does not have the power to remake or overturn an administrative decision.

### *Outcomes of an investigation*

At the conclusion of an investigation, the Ombudsman will report to the agency concerned and recommend any corrective action, where appropriate.

If the agency does not take appropriate corrective action, the Ombudsman may bring the matter to the attention of the Prime Minister and the Parliament.

A report on an investigated matter may be included in the Ombudsman's annual report.

# Chapter 10: CSN accountabilities

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## Guidelines for field-related activities

### *Purpose of guidelines*

CSN Officers will spend a significant amount of time undertaking work in the field – both proactive and reactive. The guidelines contained in this section are intended to ensure effective management and safety of CSN Officers undertaking field related work. Field related work refers to work undertaken by CSN officers in regions or locations away from their immediate office environment.

### *Management*

These guidelines apply to the management / safety of CSN Officers involved in field related work activities.

- field related work will only be undertaken with the approval of the Regional Manager.
- if required, you should request assistance from your Regional Manager or a Legal Manager. The Regional Manager or Legal Manager (in consultation with the Regional Manager), will decide what assistance will be provided and make the appropriate arrangements. You should always seek assistance before attending hazardous locations or where corroboration is desirable.
- you are required to keep a diary which details your activities. Managers will review diaries on a regular basis.
- contact your manager on a regular basis, as a minimum daily, to advise of completed and proposed activities.
- where overnight visits occur, log into the OEA network daily to check for email and to update records relating to your activities.
- it is your responsibility to ensure that the vehicle you are using for field related work is in a safe condition and that vehicle maintenance is adequate, i.e. oil, water levels and tyre pressures are maintained.
- you should always carry a first aid kit when travelling to or through remote locations.
- familiarise yourself with the provisions of this manual, in particular client aggression and powers of Authorised Officers and Inspectors. Always put your safety and that of your colleagues as a priority.

## *Diaries*

CSN officers must maintain a system for recording their field visits for management and supervision purposes. The use of a diary is the most simple mechanism through which to record these movements.

Please note that the diaries should not be used as a mechanism to record and maintain data that is relevant to complaint handling. The mechanism for holding information relating to complaints is COMS.

Accordingly any data contained in diaries related to matters must be transferred to COMS. The diary however should contain a record of events during the course of each day. Each entry must include the following details:

- date
- time commenced
- references to meetings, visits, etc. Quote file reference numbers.
- time ceased work.

The diary will ensure that historical data is maintained and will assist managers with supervision/ allocation of work.

Managers will review diaries on a regular basis.

## *Hours of duty, absences and overtime*

Normal provisions relating to hours of work, flexible working arrangements and overtime apply.

## *Client Service Network meetings*

### **Monthly Client Service Network meeting**

CSN meetings are held monthly in the North and South regions via video conference

Meetings of regional offices should be held on a regular basis and in a structured manner.

## *Seminars and workshops*

If you receive a request to present information at a seminar, workshop or other forum:

- note the request in COMS, and
- consult with your Regional Manager.

Consider whether it is appropriate for the EA or other senior manager to be involved.

## **Equipment use guidelines.**

### *Laptop computers and recording equipment*

Laptop computers and recording equipment are provided for use by CSN Officers as required.

It is your responsibility to ensure the safety of equipment and the security of information, especially when travelling by air or road.

A suitable record on the issue and return of accountable items is to be maintained by each Regional Manager.

### *Safety equipment*

All CSN officers must have the following safety equipment with them prior to entering sites such as building and construction sites.

- hard hat
- eye and ear protection
- safety shoes
- high visibility safety vest
- inclement weather jacket.

If you do not have this equipment with you at the time of visiting the site you should not, under any circumstances enter the site. It is your responsibility to wear the appropriate items when on site. You should contact your manager if you need to purchase any of the above stated equipment.

In addition to the above stated equipment, CSN officers are urged to ensure that they have other items such as sun hats and sun block if going out in the sun for any length of time.

### *Vehicles*

Vehicles may only be used in accordance with OEA guidelines.

*Press Ctrl and left mouse click to view these guidelines.*

[http://fmtan104:81/graphics.asp?showdoc=/corporate\\_info/policies\\_and\\_strategies/policies\\_and\\_strategies.asp&SubMenu=2](http://fmtan104:81/graphics.asp?showdoc=/corporate_info/policies_and_strategies/policies_and_strategies.asp&SubMenu=2)

### *Return of equipment*

If you leave the OEA, you must ensure that all equipment, including identity cards and keys, are returned



# Chapter 11: Media

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## Compliance and the media

### *How the media can be used*

The media is an essential tool for promoting compliance with the WRA. The media can be used to promote:

- knowledge of the provisions of the WRA. Increased knowledge may mean that employers, employees and industrial associations are less likely to breach the WRA.
- knowledge of the OEA's role and powers in investigating breaches of the WRA. Increased awareness of these powers has an educative and deterrent effect.
- the outcomes achieved by the OEA, including voluntary compliance and successful Court actions. This may deter similar conduct, particularly in high profile matters, and will also serve an educative purpose.

### *Officers and the media*

Officers do not deal directly with the media.

If you wish to use the media, consult with your Regional Manager, the CSN Manager North/South and the DEA CSN. If approved, the matter may be referred to the Media Manager (National Communications Team) in accordance with the OEA Media Protocol.

## OEA Media Protocol

This protocol applies to all interactions between OEA officers and the media.

- all media enquiries are referred to the Media Manager, National Communications Team (NCT). The Media Manager is the official media contact for the OEA. The Media Manager:
  - responds to all media enquiries
  - liaises with and assists the media by providing information, background material and arranging interviews, where necessary, with specialised sources within the OEA, e.g. the EA, the Deputy EAs, Legal, CSN or Regional Managers.
- All media inquiries/contacts to the NTAS must be referred to the Media Manager, NCT.



- Under no circumstances are staff from the NTAS or Regional Offices to respond directly to inquiries from the media without referring to the Media Manager, NCT. The exception to this direction is if you have been nominated as contact on a news release or have been authorised to directly respond on specific matters.
- Managers who receive inquiries at their Regional Offices should initially refer them to the Media Manager, NCT. The Media Manager will determine the nature of the inquiry before consulting with the appropriate person within OEA. If the inquiry is of a general nature it will be handled by the Media Manager. However, if the enquiry is about local, regional or state level matters, it may be referred to the Deputy Employment Advocate or the Regional Manager.
- **The Employment Advocate is the official spokesperson for the OEA.** However, other designated spokespersons may be required to speak to the media on behalf of the OEA. Other designated spokespersons may include Deputy Employment Advocates, National Communications Team, the Senior Legal Manager, CSN Managers and Regional Managers.
- All requests for interviews must be referred to the Media Manager, NCT, immediately upon receipt.
- The Media Manager, NCT, will keep the EA informed about media inquiries and will consult with the EA and the appropriate manager regarding any inquiries of a sensitive nature.
- If required, the Media Manager, NCT, will liaise with the Minister's office, regarding issues which may be more appropriately responded to at the ministerial level.
- You should alert the Media Manager, NCT, urgently of any issues/problems with AWA or compliance activity that has the potential to become a media issue. You may become aware of these issues through your work, your contacts or through specific work with employers/employees.
- You should advise the Media Manager, NCT, of any issues that can be used to gain positive media coverage for the OEA.

## Media and news releases

All media/news releases are prepared (with input from the relevant OEA area) by the Media Manager, National Communications Team, and cleared by the EA before release.

Once a media/news release has been released, it will be emailed to all OEA staff and posted on the website.

## Abbreviations and definitions

| Term                | Definition  |
|---------------------|---|
| ACCC                | Australian Competition and Consumer Commission  |
| AAR                 | Additional approval requirements for AWAs   |
| Act                 | Workplace Relations Act 1996  |
| AGS                 | Australian Government Solicitor   |
| AIRC                | Australian Industrial Relations Commission  |
| APCC                | Australian Procurement and Construction Council Inc.  |
| ASIC                | Australian Securities and Investments Commission  |
| AWA                 | Australian Workplace Agreement as defined in the Act.   |
| CA                  | A certified agreement under Division 4 of Part VIB of the Act   |
| Certified Agreement | An agreement certified under Division 4 of Part VIB of the Act.   |
| CFN                 | COMS file number  |
| Client              | A person or body seeking information, advice or assistance from the OEA and those to whom the OEA seeks to provide service.   |
| CMG                 | Code Monitoring Group   |
| Code                | National Code of Practice for the Construction Industry   |
| Complaint           | Verbal or written allegation/s of a breach or potential breach of the WRA or the Code. Complaints will include information obtained by telephone, facsimile, letter or personal visit. It includes information from anonymous complainants. |
| COMS                | Compliance Operational Management System  |
| CSN                 | Client Services Network   |
| DEWR                | Department of Employment Workplace Relations  |
| EA                  | Employment Advocate (OEA)   |
| EBA                 | Enterprise Bargaining Agreement   |
| EST                 | Eastern Standard Time   |
| Federal Award       | An award or order issued in writing by the AIRC under s143 (1) of the Act.  |
| FOA                 | Freedom of Association  |

|                        |   |
|------------------------|---|
| Induced Statement      | A statement provided by a person on the basis that that statement will not be used as evidence against that person.   |
| Inspector              | A person appointed under s84 of the Act, including State public servants who are given powers to exercise the functions of inspectors under s84 (3).  |
| Ministerial Directions | Directions made by the Secretary of the Department (under delegation from the Minister) under s84 (5) of the Act which specify how the powers or functions of inspectors are to be carried out, exercised or performed. |
| MOU                    | Memoranda of understanding  |
| NTAS                   | National Telephone Advisory Service (OEA)   |
| OEA                    | Office of the Employment Advocate   |
| OWS                    | Office of Workplace Services  |
| PCMG                   | Project Code Management Group   |
| SLM                    | Senior Legal Manager (OEA)  |
| WRA                    | Workplace Relations Act 1996  |

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