



**Australian Government**

**Department of Employment and  
Workplace Relations**

**National Office**

GPO Box 9879 CANBERRA ACT 2601

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**Office  
of  
Workplace Services  
Policy Guide**

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## INTRODUCTION

This Policy Guide provides broad guidance on the approach of the Office of Workplace Services (OWS) when providing information, advice and educative services to the public and dealing with compliance matters involving federal awards and certified agreements and the *Workplace Relations Act 1996* (the Act).

The Act is based on principles that support and encourage more direct and productive workplace relations between employers and employees. The key role of OWS in this context is to ensure the federal award system operates as a safety net of fair and enforceable minimum wages and conditions of employment. In performing this role, OWS encourages employers and employees to attempt to resolve any differences themselves in the first instance.

The first section of this Guide gives a brief overview of the legislative and policy framework that underpins our work. The second section contains information on our obligations to clients and other issues related to the delivery of our services.

The third, fourth and fifth sections provide guidance on the way we do our work. These sections outline the approach to be followed in doing the main aspects of our work. The Appendix to this Guide lists abbreviations and defines terms and phrases that are commonly used by OWS staff.

It is important to recognise that these guidelines provide only broad policy and limited procedural directions for our work. Individual State and Territory offices should have their own, more detailed procedures and practices, which will vary depending on factors such as the federal/State workplace relations environment and size of its offices.

In the States of Queensland, Western Australia, South Australia and Tasmania, the delivery of OWS advisory and compliance services has been contracted out to State Governments. For the purposes of this Guide, references to OWS should be read to include these contracted State Departments, unless specified otherwise.

These guidelines will be reviewed and updated periodically. Comments, suggested improvements and additional relevant information are always welcome and should be forwarded, through the OWS Manager in your State/Territory, to the Director, OWS - National Office.

Steve Kibble  
Assistant Secretary  
Workplace Relations Services Group

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## 1. LEGISLATIVE AND POLICY FRAMEWORK

### SECTION INDEX

- 1.1 ILO Convention No. 81
- 1.2 *Workplace Relations Act 1996 (the Act)*
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#### 1.1 ILO Convention No 81

Australia has ratified Part 1 of ILO Convention No. 81 (Labour Inspection in Industry and Commerce) which requires the maintenance of a system of labour inspection which, among other things, assists with the enforcement of any legal provisions relating to conditions of work and provides technical information and advice to employers and employees concerning the most effective ways of complying with the provisions.

#### 1.2 *Workplace Relations Act 1996 (the Act)*

The following provisions of the Act are particularly relevant for the purposes of this guide:

- the principal object (s.3) which:
  - places primary responsibility for workplace relations with employers and employees at the workplace or enterprise level and provides choice in agreement making, including the making of informal agreements not provided for by the Act;
  - provides the means:
    - (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and
    - (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and
  - provides a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement-making and ensures that they abide by awards and agreements applying to them;
- s.84, s.86 and Reg 9 give Advisers powers (subject to the Ministerial Directions) to investigate possible breaches of federal awards and certified agreements and contraventions of the Act and to sue for penalties; other people (eg, employees) may also sue for a penalty for a breach of a federal award or certified agreement (s.178(5) and (5A));
- during litigation for penalties under s.178, a court can also order an employer to pay the amount of the underpayment (with interest) and/or restore superannuation benefits by making a payment into a superannuation fund (s.178(6) & (6A) and s.179B);

- s.179 gives employees the right to sue to recover wages or other payments. A small claims procedure is provided for (s.179D) which allows a court to act in an informal manner, without regard to technicalities and with the discretion to allow or restrict legal representation;
- s.305 makes it an offence for a person to hinder, obstruct or make a false or misleading statement to an Adviser/during an inspection;
- s506(2) which provides for employees under Schedule 1A to take their own legal action; and
- Reg 131L and 131M relating to the inspection and copying of records and makes it an offence to not advise an Adviser where the records are kept.

### **1.3 Workplace relations advice and services for employers and employees output**

OWS' role is to help employers and employees understand and exercise their rights, obligations and choices under the *Workplace Relations Act 1996* (the Act), awards and certified agreements, and in Victoria, Schedule 1A of Part XV of the Act.

In performing this role, OWS inspectors have a duty of care to take reasonable steps to correctly advise employers and employees of their rights and obligations under relevant industrial instruments, and to investigate all suspected breaches, regardless of whether the party suspected of breaching its obligations is an employer, employee, union, employer organisation or another third party.

The activities of OWS fall within Outcome 2 of the annual Portfolio Budget Statement, *Flexible and fair workplace relations at the enterprise level*. The objective of the OWS element of the Outcome is outlined in the section titled *Workplace relations advice and services for employers and employees output* (Output 2.2.4).

### **1.4 Ministerial Delegations and Directions**

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

State/Territory OWS Managers have a responsibility to ensure all their Advisers are provided and familiar with the Ministerial Directions issued by the Secretary. The current Ministerial Directions can be accessed via the Commonwealth of Australia Government Gazette, Special Gazette No. S360 of 30 September 2002.

### **1.5 Reporting**

*ILO and DEWR Annual Reports*

The Act and the ILO Convention require reports to be prepared on the activities of OWS. These reporting requirements are important for our public accountability and are met in the Department's Annual Report. To assist in the preparation of these reports, State offices and the Contracted States will periodically be required to provide necessary information.

### *OWS Quarterly Reports*

In addition to the annual reports, quarterly reports are to be provided to National Office within 15 working days of the end of the September, December, March and June quarters and copied to other State/Territory Managers. Quarterly reports should provide an overview to National Office of activities within each OWS State and so information to be included is at the discretion of the OWS State and Territory Managers. However, at minimum information should be provided on:

- Performance against key indicators (eg. OWS-KPIs & DOORS indicators) and workload levels
- Information on workload and performance not sourced through CLAIMS (for example, telephone inquiry activity, any counter activity not recorded in CLAIMS)
- Results of client survey activity
- Information on Workplace Advisory Service activities and performance

State Offices should also have a system in place where, as part of their quarterly reporting requirements, all staff are involved in critically examining performance against their workplans and performance standards.

### *Contracted States*

Contracted States quarterly reporting requirements are defined within each Contract.

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## 2. CLIENT SERVICE DELIVERY AND CORPORATE GOVERNANCE

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- 2.1 Our Role
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- 2.6 The Commonwealth Ombudsman
- 2.7 Handling Client Aggression
- 2.8 Gifts and Other Benefits
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#### 2.1 Our Role

OWS' role is to help employers and employees understand and exercise their rights, obligations and choices under the *Workplace Relations Act 1996* (the Act), agreements and awards, and in Victoria, Schedule 1A of Part XV of the Act.

#### 2.2 Quality Assurance

It is important that processes be put in place to ensure that quality outcomes are achieved in service delivery. State/Territory OWS Managers are responsible for ensuring:

- that the policy guide is being followed
- that supplementary local guidelines are developed where required and followed

##### *Client Service Delivery and Corporate Governance*

- APS and corporate values are implemented
- local response guidelines on Client Aggression are available at each office
- DEWR Service Charter is observed
- duty of care is observed to act impartially towards employers and employees, including in the handling of claims from both employers and employees

##### *Providing Information Services*

- Wageline provides a quality advice and referral service which meets key performance indicators (see section 3.2)

##### *Providing Advisory and Educative Services – via the OWS workplace advisory service*

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- WAS services are provided in accordance with WAS business plans – as approved by OWS-NO and State/Territory Managers

#### *Handling Claims*

- every effort is made to meet key performance indicators (see section 4.2)
- Advisers are appropriately trained to perform the requirements of their jobs (eg in investigation techniques, evidentiary requirements, written skills, duty of care, etc)
- a preliminary assessment process (for responsiveness, employee/employer relationship, factual accuracy) is in place to determine which claims should be investigated
- internal investigation procedures and policies allow claims to be appropriately investigated to determine whether they are sustained or otherwise
- every reasonable effort is made to achieve voluntary compliance before finalising a claim
- internal claim handling procedures ensure that Advisers are required to regularly update claimants on the status of their investigation, particularly where there are delays in finalising a claim
- after all claims are finalised, that they are properly signed off, noting any issues, including errors which need to be corrected

#### *Litigation*

- after a claim is found to be sustained and voluntary compliance has not occurred, identifying the options available to the claimant (including the level of assistance to be given by the Department) in order to commence recovery action
- any recommendation by an Adviser to initiate litigation action is consistent with the criteria in section 5 of this Guide (Litigation) and the Ministerial Directions

### **2.3 Official Conduct and APS Values**

Standards of official conduct and APS Values are currently set out in the

- APS Code of Conduct at <http://www.apsc.gov.au/conduct/index.html>;
- APS Values statement at <http://www.apsc.gov.au/values/index.html>; and
- the Departments People and Leadership statement at <http://epsps002v1.application.enet/C5/C11/Capability%20and%20Career%20Development/People%20and%20Leadership%20Subcommittee%20Library/About%20the%20People%20and%20Leadership%20Statement.aspx#2>.

Our key organisational behaviours are:

- Responsiveness,
  - Ethics and Integrity,
  - Service to Ministers and Clients
  - Professionalism
  - Enthusiasm
  - Creativity
  - Teamwork
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In summary these require all APS employees to carry out their duties with care, diligence, honesty, integrity and to deliver services to the public in a fair effective, impartial and courteous manner.

## 2.4 DEWR Service Charter

The DEWR Service Charter sets out the quality of service clients can expect to receive from the organisation and outlines any avenues for making complaints and the means for commenting on the charter.

**NOTE: The new Service Charter of the Department is now available on the Intranet in Word format. A HTML version will be available after 14 November when the Service Charter will be publicly available through the Internet.**

When dealing with the public, OWS officers should:

- be open, ethical, honest, respectful and courteous
- respond promptly, acknowledge you and identify ourselves
- provide accurate, consistent, timely and clear information and give reasons for our decisions
- take your suggestions and complaints seriously and learn from them, and
- adhere to the laws and principles applying to information you provide to us.

State and Territory OWS Managers are responsible for ensuring that staff are aware of the DEWR Service Charter.

## 2.5 Client Feedback - Reviewing Matters for Dissatisfied Clients

The Service Charter outlines the department's commitments to clients. Client feedback should be provided in accordance with the client feedback handling guidelines at <http://fwapd045/CFS/Home/Start.asp>.

When handling client dissatisfaction, officers should work on the premise that a client has a right to express their concerns and to have the matter investigated thoroughly and fairly.

In the first instance, officers should try to deal with client dissatisfaction at the front line and should, when receiving an oral complaint, clearly identify themselves. It may not be appropriate for an officer to handle an allegation where the officer is the subject of the dissatisfaction (for example, where a client is alleging that an officer was rude, abrupt or discriminatory in their behaviour). These claims should be referred to a manager who should determine the appropriate officer to resolve the matter.

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The following general principles should be applied in handling client dissatisfaction over the telephone:

- stay objective and do not provide personal views
- listen, record details and determine what the client wants
- confirm the details received
- be courteous, empathise and do not offer excuses or argue with the client
- explain the courses of action available
- do not lay blame or be defensive
- do not create false expectations
- if the matter cannot be resolved immediately, commit to doing something within a time frame and check whether the client is satisfied with the proposed action, and, if not, advise of any alternative courses of action
- provide an acknowledgement, eg by writing and thanking the client for the feedback, making a follow-up phone call etc

Officers may decide to offer the following remedies in order to resolve a matter:

- give the client the opportunity to provide additional information or undertake to conduct a review of the matter in order to check that the decision made was correct and appropriate
- provide a written explanation of the way in which a decision was made or provide a written chronology of events and the material examined in order to clarify the time frame within which a matter was handled
- provide a written apology (eg for an error, a delay or a misunderstanding)

Where a written complaint is received a written response should be provided following these principles, remedies and time frame.

A clear time frame, not exceeding 20 days, should be established for dealing with the matter. However a staged approach should be taken when managing more difficult claims. This may involve, in the first instance, front line handling with the recognition that the matter may need to be referred to a manager to deal with or to determine whether an internal investigation is required.

Where a claim involves serious allegations, the manager should, in consultation with the State/Territory OWS Manager, consider Departmental guidelines to decide whether the matter can be resolved by an internal review or whether it requires an external independent review.

#### *Recording Client Feedback*

Client feedback should be recorded on the Client Service Feedback System.

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## 2.6 The Commonwealth Ombudsman

While it is OWS policy to deal with client dissatisfaction as close to the front line as possible, there will be circumstances where a client lodges a complaint with the Commonwealth Ombudsman.

It should be noted that the Commonwealth Ombudsman operates under the principle that a client should attempt to resolve a complaint with the appropriate agency in the first instance and the Ombudsman may decline to investigate a matter where this has not already been done.

It is therefore always appropriate to encourage a client to have their matter dealt with by the OWS in an attempt to resolve it internally. Officers should not recommend the Commonwealth Ombudsman as an avenue of complaint until every reasonable attempt has been made to resolve the matter.

Where staff are aware that a matter is likely to go to the Ombudsman, they should inform the relevant OWS Manager who will inform OWS National Office.

OWS Managers should also ensure that all inquiries or requests involving the Ombudsman's Office are handled in a cooperative and prompt manner.

Contact details for the Commonwealth Ombudsman can be found at <http://www.comb.gov.au/>.

## 2.7 Handling Client Aggression

Client aggression means unacceptable, hostile behaviour directed against an officer such as behaviour which creates an intimidating, frightening or offensive situation and/or adversely affects the officer's ability to perform their work effectively and efficiently.

Managers should provide support to staff in handling difficult or aggressive clients. However, officers do have responsibilities to provide a professional service at all times. The following principles will assist in handling these situations:

- stay objective and do not provide personal views
  - the factors taken into account in making a decision must be explicitly stated to the affected person and should wherever possible be conveyed to that person by the decision maker
  - where a decision is made in writing the name of a contact officer should be provided so that the person can phone or make an appointment to see them if they wish to discuss the reasons for the decision further
  - officers should make every effort to put the person at ease and discussions should only be
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terminated after all such attempts have failed

- where a person's behaviour is unacceptable and affecting an officer's ability to provide services to other clients, the officer should, where appropriate, seek the assistance of a more senior officer; alternatively the person could be asked to leave the premises
- where a person is aggressive on the telephone and will not accept a decision or referral of a matter to a manager and their behaviour is preventing an officer from providing services to other clients, the person should be advised that the conversation will be ended and the officer can then hang up the telephone
- where an officer is planning a workplace investigation, the officer should review information on the file prior to the visit to check for any history of violence, aggressive dogs on the premises etc. - if this is the case the officer should inform a manager before the visit and it may be appropriate for the officer to be accompanied by either the manager or another officer.

State/Territory OWS Managers are responsible for ensuring that local response guidelines are developed for each office.

Further information is available in the Client Aggression Guidelines at <http://epsps002v1.application.enet/C6/C11/Performance%20and%20Agreements%20Tea/Occupational%20Health%20and%20Safety%20OHS%20Library/Client%20Aggression.aspx>.

## 2.7 Gifts and Other Benefits

- Officers must not use their official position to obtain a benefit for themselves or for anyone else.

In circumstances where it may be ill-mannered or embarrassing to refuse or where the gift is part of a formal exchange, the officer concerned may accept the gift provided the acceptance is promptly notified to the Secretary [through their State/Territory Manager] (for gifts over \$100) or to the State Manager (for gifts under \$100) with a proposal recommending its acceptance, retention or disposal. A copy of all proposals which go to the Secretary should be sent to the Assistant Secretary, OWS for information.

As a general rule, offers of substantial gifts or hospitality (eg those valued at greater than \$100, airline tickets and accommodation) should be refused. If you are offered a gift/benefit of a value of **less than \$100** then verbal approval to receive this gift should be obtained from any of the following:

- Deputy Secretary;
- Chief Financial Officer, Financial Management Group; or the
- Group/State Manager and Assistant Secretary.

Under no circumstances should officers accept cash.

Officers who are unsure about whether or not to accept a gift or benefit, should seek the advice of their supervisor. In cases where prior approval cannot be sought officers should

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exercise their judgement and commonsense in determining whether the gift or benefit should be accepted at all.

Further information is outlined in the Practical Guide on Giving and Receiving Gifts at <http://epsps002v1.application.enet/C8/Financial%20Policy%20%20Services%20Tea/Document%20Library/Giving%20and%20Receiving%20Gifts%20-%20Practical%20Guide.url>

## 2.9 Privacy and Freedom of Information

The two main pieces of legislation which deal with the handling of personal information are the *Privacy Act 1988* (the Privacy Act) and the *Freedom of Information Act 1982* (the FOI Act).

### *Privacy Act 1988*

Where personal information is collected for a particular purpose, the provisions of the Privacy Act generally restrict the use of that information to that particular purpose. The Privacy Act also prohibits the disclosure of personal information, subject to a limited number of exemptions.

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 context presented. The definition of personal information can include information such as photographs. It should be noted however that a business is not a person. Therefore, information like the name of a person on the signature block of a company document is not personal information.

Individuals may complain to the Privacy Commissioner where they believe there has been an interference with their privacy by virtue of the actions of a Commonwealth agency.

While a fundamental principle of the Privacy Act is that personal information may only be used for the purposes for which it was collected, there are some exceptions to this principle. These are where:

- the individual concerned consents to the information being used for another purpose
- the record keeper believes, on reasonable grounds, that the use of the information for another purpose is necessary to lessen or prevent a serious and imminent threat to the life or health of the individual concerned or another person
- the use for another purpose is required or authorised by law (as is the case under freedom of association legislation, information summonsed by a court, etc)
- the other purpose for which the information is used is directly related to the purpose for which the information was obtained
- the use for another purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of public revenue.

While disclosure is permissible in the last exception, this does not mean that disclosure has to occur. In determining whether officers should actively seek out and provide information to

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another agency (eg the Australian Taxation Office), it is necessary, on a case by case basis to weigh up a number of factors in order to determine whether there is a reasonable necessity for the officer to do so, including the value of the information in the enforcement of the criminal law or a law imposing a pecuniary penalty, or in the protection of the public revenue; and the nature of the offence or abuse.

If there are any doubts held about giving information to another agency, advice should be sought from your manager.

Where an officer decides to disclose information to another agency, they must keep a record giving the details of the disclosure (eg date, information disclosed, name of the agency to which the information was disclosed etc) in the record where the information which was disclosed is kept.

Further information is available at *Privacy Act 1988*.

#### *Freedom of Information Act 1982*

The FOI Act creates a general right of access to documents in the possession of an agency with some rights by the agency to withhold information which discloses the identity of the person affected.

Clients should not be required to lodge FOI requests for access to documents provided by them. Where an FOI application or a Privacy Act matter is received it should be referred to your manager immediately as strict time frames must be adhered to.

Further information on FOI is available at:

<http://epsps002v1.application.enet/C8/C1/Legislative%20instruments/default.aspx>.

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## 3. PROVIDING INFORMATION, ADVICE AND EDUCATIVE SERVICES

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- 3.10 Technical Advice Register
- 3.11 Legal Advice - OWS LEGAL ADVICES PROTOCOL
- 3.12 Educative Activities
- 3.13 Fee for Service

### 3.1 Introduction

The objective of the information, advisory and educative functions of OWS is to provide employers and employees and their advisers (eg, employer organisations, unions, solicitors, accountants, parents etc) with access to information about the provisions of federal awards, certified agreements and the Act (including Schedule 1A) so they can understand their rights, obligations and entitlements and take advantage of the opportunities available under the Act.

In providing information and advice, OWS Advisers should:

- make every reasonable effort to provide accurate up-to-date information;
- provide impartial advice which is not based on personal views;
- avoid raising expectations about outcomes;
- not express personal views about Government policy; and
- not speculate about policy or legislative changes.

Where appropriate, OWS Advisers should inform clients that they should consider seeking their own legal advice; eg for complex queries, where the caller provides inconsistent or insufficient information, etc – see below for further guidance.

### 3.2 Key Performance Indicators

The performance standards for information, advisory and educative services are:

*Telephone Enquiry Service*

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- 90% of callers are queued for less than three minutes;

#### *Correspondence*

- 90% of correspondence is finalised within 5 working days of being received in the office;

#### *Educative Services – workplace advisory service (WAS)*

- The extent to which clients report that our advice has helped them understand their options and enabled them to pursue effective workplace relations outcomes
  - 80% positive feedback

### **3.3 Telephone Requests for Advice and Assistance**

The main information and advisory service provided by the OWS is through Wageline, which provides a basic advisory and referral service to the general public on workplace relations matters including information on federal awards, Schedule 1A in Victoria, certified agreements and the Act.

Wageline staff are not expected to answer every question at the time of the call. Where an enquiry is complex it may be necessary to refer it to another officer or have an officer call the enquirer back. It may also be appropriate to ask for more difficult questions in writing.

Where an enquiry is received from a person who requires the assistance of a translator in order to understand the advice or their entitlements, the Translating and Interpreting Service (TIS - on Ph 131450) or the National Accreditation Authority for Translators and Interpreters (NAATI - on Ph 1300 557 470 or at [www.naati.com.au](http://www.naati.com.au)) should be contacted as quickly as possible to arrange for the service to be provided. The relevant manager should also be advised.

Where a telephone request is received from a party making an allegation about a breach matter the officer should:

- try to establish whether the provisions of a federal award, Schedule 1A, a certified agreement or the Act apply to that party;
  - encourage the caller to use relevant dispute resolution procedures if appropriate; and
  - check whether the matter is already the subject of court/AIRC proceedings.
- Where it is revealed that the matter is the subject of court/AIRC proceedings the person should be advised that the matter will not be investigated. Note that where the court/AIRC is only dealing with an unfair dismissal case, the officer could handle any other matters (eg unpaid wages) in the usual way. This might not be the appropriate course of action in all States and Territories, however, particularly where the Commission has a history of negotiating an outcome with the parties in full settlement of all outstanding award matters.

Where an officer is satisfied, on the basis of the telephone conversation:

- that, where appropriate, an employee has made an attempt to resolve the matter with their employer, or visa-versa;

- that they are unable on the basis of the information provided to determine whether the employer is a respondent to a federal award or covered by the federal system; or
- the matter is not subject to court/AIRC proceedings,

the officer should obtain the person's name and address and send them a claim form to complete.

State/Territory offices should develop their own more detailed guidelines and procedures which take account of local issues.

### **3.4 Written Requests for Advice and Assistance (including via WageNet)**

All letters and WageNet requests for information and completed claim forms should be handled initially as correspondence. Such enquiries should be handled on the same basis as telephone requests. Where a request for information or advice is complex or requires further investigation or referral, an interim response indicating an approximate time frame for a final response may be appropriate.

### **3.5 Counter Enquiries**

Clients may request information, advice or assistance from the Department over the counter. These enquires should be handled in a similar manner to those received over the telephone.

State/Territory Offices should also ensure that appropriate systems are put in place to manage counter enquires, including procedures to handle difficult or aggressive clients in line with Departmental policy

(<http://epsps002v1.application.enet/C6/C11/Performance%20and%20Agreements%20Tea/Occupational%20Health%20and%20Safety%20OHS%20Library/Client%20Aggression.aspx> ).

### **3.6 Referral to Unions and Employer Organisations**

OWS does not distinguish between enquiries and requests for assistance on the basis of whether the person is a union member, non-unionist, or whether the employer is/is not a member of an employer association. All clients are to be treated equally.

However, where employees and employers are seeking information, advice or assistance about a breach matter, the officer handling the case can advise the employee or the employer of the option of contacting the relevant union or employer organisation for assistance.

### **3.7 Public Sector Employees**

Information and advice about the provisions of federal awards, certified agreements and the Act should be provided to public sector employees on the same basis as private sector enquirers.

When providing information, staff should bear in mind the grievance resolution and other mechanisms available to public service employees, such as those available under the *Public Sector Act 1999* (PS Act). The Australian Public Service Commission (APSC -



<http://www.apsc.gov.au>) has primary responsibility for the administration of the PS Act. Among others, the APSC is responsible for:

- administering, and facilitating understanding of, relevant legislation made under the PS Act; and
- reviewing actions affecting APS employees in their employment.

Section 4.18 provides guidance on the handling of claims from employees of the Commonwealth, State and Territory governments and Government Business Enterprises.

### **3.8 Role of the Office of the Employment Advocate**

Both the OWS and the Office of the Employment Advocate (OEA) have responsibilities under the Act to provide advice and assistance on the application of the Act, federal awards, Schedule 1A in Victoria, certified agreements and related legislation. A Memorandum of Understanding has been agreed between the Department and the OEA in relation to who assumes primary responsibility for specific matters. In summary, it is agreed that:

- the OWS will be responsible for issues relating to federal awards, certified agreements, Schedule 1A in respect of Victorian employers and employees, time and wages records, pay slip requirements and minimum entitlements under the Act (eg, termination provisions);
- the OEA will be responsible for AWAs, including filing and approval requirements and initial inquiries regarding compliance with approved AWAs. It will also be broadly responsible for matters relating to freedom of association, coercion during agreement making, right of entry and strike pay; and
- OWS and the OEA will work co-operatively in undertaking educational and promotional activities.

The OEA's website is at [www.oea.gov.au](http://www.oea.gov.au).

### **3.9 Role of the Office Building Industry Taskforce (BIT)**

BIT operates exclusively in relation to the building and construction industry. Broadly, this includes large-scale residential developments, non-residential developments and engineering construction work, but not the construction of single residential dwellings. You can find more information as to exactly what is and is not included in the meaning of "building and construction industry" on its website at <http://www.buildingtaskforce.gov.au/default.asp>.

Within the industry, BIT's main areas of responsibility are:

- investigating breaches of industrial relations laws in the building and construction industry;
  - investigating breaches of awards and agreements (inquiries about these matters are generally referred to OWS);
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- dealing with requests for information from participants in the building and construction industry; and
- giving advice on the operation of the law, federal awards and agreements.

BIT also provides a '*whistleblower service*' via its Hotline (Ph 1800 003 338). The hotline gives people the opportunity to anonymously tell BIT of any kind of unlawful behaviour and we can advise, investigate and/or refer the matter.

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

### 3.10 Technical Advice Register – *currently being incorporated into WR Act online project*

A Register of technical advice can be accessed at <http://fwian005/tar/default.asp>. The register provides the following types of information to assist enquiry and compliance staff:

- legal advice received from the Department's legal areas and the Australian Government Solicitor relating to the taking of litigation action in particular cases;
- legal, technical or policy advice received from Legal Services and Policy areas of the Department on matters relating to the general interpretation of a federal award, certified agreement, the Act, or other relevant federal legislation (eg, the Freedom of Information Act and the Privacy Act);
- advice from Legal Services on matters relating to the way in which powers and functions under the Act should be exercised; and
- decisions of courts and tribunals which assist with the interpretation of the provisions of federal awards, certified agreements, the Act or other relevant federal legislation (eg, the Freedom of Information Act and the Privacy Act).

State/Territory offices also have a TAR administrator with the capacity to add users and material to the database.

### 3.11 Legal Advice - OWS LEGAL ADVICES PROTOCOL

#### *Objective*

To make sure your request for legal advice is dealt with by the most appropriate people, given appropriate priority, and dealt with as efficiently as possible.

#### *Before you seek advice*

Before requests for legal advice are sent to either OWS National Office (OWS NO) or the Australian Government Solicitor (OWS only), every reasonable attempt must be made to resolve the issue within your office. This could include:

- checking to see if the matter has been dealt with before (ie, it may already be covered in the Register of Technical Advice);
  - consideration by a manager;
-

- consultation with other State\Territory Offices (or the nominated OWS State office contact for a Contracted State);
- examination of relevant court/AIRC decisions (eg, [AUSTLII](#), or the [AIRC](#)); and
- where appropriate, seeking the opinion of a relevant employer organisation, union or major employer(s) covered by the award or in the industry.

### *Making a request*

If the matter cannot be resolved locally, requests to OWS NO for legal advice should be referred through the State/Territory OWS Manager (or Contract Manager) to the OWS National Office Manager. He/she will determine whether the matter should be referred to WRLG for an opinion and, if so, will do so within 48 hours of receipt of the request. If OWS NO decides to try to resolve the matter itself and is unsuccessful, it will refer the matter to WRLG within two weeks of receipt of the request.

Requests to OWS NO should preferably be in minute form, but State/Territory OWS Manager (or Contract Manager) can also send requests to the OWS National Office Manager by email. Email requests should be titled “request for legal advice – [relevant subject matter]”. If the matter requires a very quick response eg same day, it should have the word “urgent” in the title”. In these cases, we suggest you also telephone the OWS National Office Manager to let us know that it is coming and will require a quick response.

A State/Territory OWS Manager may seek legal advice on matters which involve the provision of federal awards or certified agreements directly from the Australian Government Solicitor. An information copy of requests must also be sent to the OWS National Office Manager. Contracted States must go through OWS-NO with all requests.

### *What we need to provide advice to you*

Whether sent by email or in hard copy, providing material explaining the background and context of the problem will assist in providing timely and accurate advice that sets out the options. The list below identifies the relevant material. All of this material may not be available at the time the request is made, but providing as much as possible will ensure relevant facts are taken into account:

- Overview of the agreed facts, and, if relevant, identification of matters on which the parties do not agree;
  - Copies of relevant material eg correspondence, formal documents. Things that may not seem relevant can be crucial, and make a significant difference to the options that are available;
  - Clear identification of the award(s), agreement(s) and/or legislation involved;
  - Clear identification of the ‘problem’ you want advice about – with specific question(s);
  - Identification of the final recipient of the advice, eg delegate, Minister’s Office, Deputy Secretary, employer, employer association, claimant;
  - Advice as to any relevant dealings with other legal advisers;
  - A realistic desired timeframe for receiving the advice.
-

*External legal advice*

In many cases, WRLG will have dealt with similar issues before, or there will be a pretty settled view on the problem. In such cases, WRLG will be able to answer the query without external advice.

In other cases, there may be more complex issues about which DEWR do not have a settled view about. In these cases, external legal advice may be sought. This will usually take longer, and DEWR will be charged for the advice. Properly certified accounts from the Australian Government Solicitor for legal services are paid from the Legal and Compensation Appropriation which is administered by Workplace Relations Legal Group. Such accounts should be forwarded to Legal Policy Branch 1 through the Director OWS-NO.

*What you will get from OWS NO and WRLG*

We will usually provide you with written advice in response to your problem, either in the form of a minute or an email. Usually, the advice will summarise the key legal (and relevant policy) issues, assess the options and then recommend a particular course of action.

In cases of information/guidance, or where we check material for you, we may provide you with oral advice and then follow up with an email.

We are happy to respond to any questions or queries you have after receiving our advice. We also appreciate feedback about the utility of our advice and any difficulties you might have encountered in implementing it.

*Tracking the requests for advice*

OWS NO will maintain a list of all unresolved requests received and referred to Legal, including the date the matter was referred to Legal and the timeframe for the response provided by Legal

This list will be circulated when updated and as an attachment to the 'OWS NO Monthly Update'.

*Circulating the advice*

Until DEWR's IT area has finished developing a new advices database (to replace the now defunct TAR) OWS-NO will circulate all advices received from Legal, including to the contracted States where allowable.

*Using the advice*

WRLG provides legal advice for a specific legal problem. The same advice may be of assistance in similar problems in the future. But advice can turn on a very specific legal principle or fact. Recipients cannot automatically rely on it for future problems, even where they seem similar. WRLGL is happy to assist people in clarifying the extent to which advice can be used generically, and to apply the same legal principles to a new problem.

Legal language can take on a different meaning when used in a different context. If you would like to modify text we have cleared or provided to you, please let us know and we are more than happy to assist you with this. This will ensure that any revised material is legally accurate. WRLG would also appreciate if OWS-NO would consult with it before distributing the advice more widely than envisaged when first provided.

### 3.12 Educative Activities – Workplace Advisory service (WAS)

Educational activities and seminars play an important role in:

- Helping employers and employees to understand their employment rights and responsibilities
- Promoting flexible employment arrangements and opportunities available under the Act

State/Territory OWS Managers are responsible for ensuring that National Office is appropriately consulted on any WAS programs that are being developed.

Criteria for deciding to conduct educative activities include:

- Government priorities
- New or amended legislation
- Perceived problem areas (eg Time and Wage Records and Payslip Regs, specific award or industry problems, etc); or
- Client feedback

Educative activities should be consistent with the Departmental communication guidelines at <http://fmtan104/guidelines/communication/default.asp> and the WAS procedures manual.

State/Territory OWS Managers are responsible for ensuring that National Office is advised on the outcome of any education programs. Such advice should be in writing and include sufficient details to allow the information to be used for internal (briefs, benchmarking, etc) and external reporting (annual report, ILO reporting, etc) purposes.

### 3.13 Fee for Service

The general principle which applies when providing information and advice is that when it is a fundamental part of the Department's responsibilities under the Act it is provided free of charge, ie. it is provided in the public interest. The public interest is served by providing information and advice for the purpose of observance with the provisions of federal awards, Schedule 1A in Victoria, certified agreements and the Act.

OWS often receives requests for assistance which extend beyond its core responsibilities (ie public interest). Such requests could include:

- requests for historical wages and other information for a compliance matter, eg a request from a solicitor handling a private matter, a request from an organisation seeking details for a worker's compensation case, etc;
  - requests for complex advice from organisations or individuals who have the resources or capacity to pay for such advice or who themselves charge for providing that advice to clients (eg solicitors, employer organisations, unions and consultants);
  - requests for information comparing various award provisions which are purely for research purposes, eg a request from a student, an organisation or private consultant (note that
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where individuals such as students request information which is likely to incur a charge they could be directed to alternative sources of information, eg libraries and/or the Internet);

- requests from students or educational institutions; and
- providing speakers or materials for seminars on topics which are not part of the OWS' information and/or seminar work program.

Such requests are considered outside of the core responsibilities for OWS. Accordingly:

- OWS is not obliged to provide these services merely because they have been requested;
- Resources should not be redirected from core enquiry, compliance and programmed educational activities to research such requests; and
- Enquirers should be advised on how best to otherwise obtain the information sought eg; internet sites, union/employer associations, AIR, public libraries, private research organisations, etc

It may be considered appropriate on occasions to provide some of these requested services. This could be done on a fee-for-service basis.

State/Territory OWS Managers are responsible for developing and implementing guidelines for the type of services, which may be provided on a fee for service basis. These guidelines should address:

- The type of services which may be provided (bearing in mind the implications for personal development, providing a greater variety of work, the utilization of particular skills/qualifications, OWS core activities);
- The circumstances in which such work may be performed (bearing in mind core workloads); and
- The fee to be charged (which should generally cover at least the real cost of undertaking the work).

Such guidelines are to be consistent with the Departmental guidelines at <http://fntan104/guidelines/financialManagement/default.asp>.

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## 4. COMPLIANCE

### SECTION INDEX

- 4.1 Introduction
- 4.2 Key Performance Indicators
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#### 4.1 Introduction

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

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

#### 4.2 Key Performance Indicators

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

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### 4.3 Ministerial Delegations and Directions

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

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

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

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

### 4.4 Appointment of Inspectors (Advisers)

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

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

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

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

#### 4.5 Identity Cards

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

##### *Return of ID cards*

When an Adviser permanently ceases to perform Adviser functions (eg due to retirement, resignation, transfer, etc) they must return their identity card to the OWS Manager (or Contract Manager) in their State or Territory who should forward it to the Assistant Secretary, Workplace Services Branch in DEWR National Office.

##### *Temporary absences*

If the absence is temporary (eg LSL, temporary transfer, leave extending for eight weeks or more, etc) the identity card should be surrendered to a nominated senior manager for safekeeping. OWS Managers (or Contract Manager) are responsible for nominating the relevant senior manager in their State or Territory.

#### 4.6 Claims Investigation

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

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

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

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

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

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

#### *Regular liaison with claimants*

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

#### *Record keeping*

Advisers must also keep appropriate records of investigation on file, including records of correspondence provided by the claimant, interviews, phone contacts, findings, key decision making points with supporting reasoning, etc. Drafts need not be kept. Files should be maintained and retained in accordance with Departmental guidelines – see <http://epsps002v1.application.enet/C1/Information%20Management%20Team/default.aspx>

### **4.7 Determining Whether a Matter is a Claim**

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

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

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#### **4.8 Arrangements for Transferring Claims Between States/Territories**

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

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

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

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

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

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

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

#### **4.10 Confidentiality**

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

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

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

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

#### 4.11 Determining the Method of Claims Investigation

##### *Non-sensitive claims*

Non-sensitive claims may be resolved by:

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

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

##### *Sensitive claims*

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

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

#### 4.12 Mediation

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

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

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

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

#### 4.13 Office-based and Workplace Investigations

##### *Office-based Investigations*

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

- There is no legal authority to demand documents by telephone – however, they can be requested, as there is no impediment to records being provided on a voluntary basis.

S86(1A)(c) of the Act, which came into effect on 1 January 2004, allows Advisers to require a person, by written notice, to produce documents at a specified place within not less than 14 full days. S86(4A) allows service of the notice to be by Fax. If an Adviser intends serving a notice under s86(1A)(c), it is important that do so in accordance with the guidelines in section 4.21 of this guide.

- This ability to serve notices to demand documents without a prior physical visit should increase the effectiveness of office-based investigations, particularly when dealing with claims involving employers that are some distance from OWS offices

##### *Workplace investigations*

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

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1 Subject to the development of any accreditation requirements from NADRAC

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

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

#### **4.14 Cases Where Other Employees May Be Affected**

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

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

#### **4.15 Determining Whether the Case is Sustained or Not Sustained**

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

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

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

#### **4.16 Over-award and Offsetting Entitlements**

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

When dealing with offsetting entitlements the following principles should apply:

- OWS does not have a role in investigating and/or enforcing over-award/agreement pay rates and conditions as such arrangements are entered into under common law. Claimants should be advised to pursue any such payments themselves, possibly by taking their own civil action;
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- if the employer has made over-award payments to the employee that are general, (ie, they are not specific in the sense that they were earmarked as payment for a particular entitlement) then those payments can be used to offset other underpayments
  - : for example, if an employee's payslip shows an under-award hourly rate of pay but the overall payment appears OK, indicating they have probably been underpaid wages and overpaid something else, then offsetting should be applied and the claim not pursued;
  
- however, if the employer has made over-award payments to the employee that are specific in nature, (ie, they are earmarked as being payments for a specific purpose or entitlement) then, technically, those payments can only be applied to those purposes or entitlements. They can not be used to offset other underpayments.
  - : in this case, an Adviser or the employee can pursue underpayments. For example, if the employee's payslip shows they have been overpaid \$20 in overtime but underpaid \$20 in annual leave, the annual leave underpayment can still technically be pursued – as the overpayment specifically related to overtime so it cannot offset the leave underpayment;  
  
However, if the employee has not been disadvantaged in terms of their overall entitlements (ie over-award payments and underpayments combined) the Adviser will not generally be expected to pursue the claim as the employee has received their minimum entitlement – based on what they should have received for the hours worked. Subject to the circumstances of the case, the Adviser may still choose to pursue the claim – eg if other employees are likely to have been similarly underpaid.  
  
If an Adviser does not pursue the claim, (s)he still has an obligation to advise the employee of the amount of the technical underpayment and their right to take their own legal action (see 5.5 and 5.6);
  - : if the employee has been disadvantaged in terms of their overall entitlements then it would be appropriate for an Adviser to investigate and finalise the matter in the usual way.

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

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

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

- if the employer and employee have agreed that the employer will make payments to the employee that are general (that is, not specific in the sense that they are 'earmarked' as payment for a particular purpose or for a particular entitlement) then those payments can be applied to offset award entitlements; but
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- if the employer has made payments to the employee that are specific in nature (that is, that are 'earmarked' as being payments for a particular purpose or entitlement) then those payments can only be applied to award entitlements of a similar nature – that is, there can only be an offset of 'like against like'."

See Poletti v Ecob at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep4031.html?query=%5e+ecob> .

#### 4.17 Failure to Voluntarily Comply

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

- after investigation, the party considered in breach is provided with written notification of the breach(es), advice on possible action to resolve the case (including for any other employees who may be affected) and given an opportunity to respond within a reasonable period;
- the Adviser has given full consideration to any response from the party in breach, assessed any additional information provided and contacted the party where any further issues need clarification; and
- the party has been issued with a final letter warning that litigation action may be taken and given a reasonable period to respond eg at least seven days.

#### 4.18 Offers to Settle

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

##### *Full settlement of all matters*

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

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

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

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

#### *Payment by instalments*

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

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

#### *Settlement of some matters or for part of the period*

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

### **4.19 Public Sector Employees**

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

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

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

It is expected that the above procedures will, in most cases, lead to the resolution of the matter. If the above procedures have not been effective, the matter should then be handled in the same way as an enquiry or claim from a private sector employee or employer. Noting that:

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

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

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

#### 4.20 Targeted Activities

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

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

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

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

- Objectives – Ensure the elements of the campaign meet its objectives
  - Target - What is the campaign targeting?
-

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

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

#### 4.21 Failure to Produce Documents

##### *Documents sought during or following an inspection*

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

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

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

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

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

- (3) Initiate action for a breach of section 305 (Obstruction) – see section 4.22 of this Guide. This action would generally not be taken as a first resort.

##### *Documents sought without a prior inspection*

Paragraph 86(1A)(c) authorises Advisers to require a person to produce documents without having to first undertake a physical inspection of the workplace. S86(4A) prescribes that the notice must be:

- in writing;
-

- be served on the person (including by Fax); and
- require the person to produce (to the inspector) the documents at a specified place within a specified period of not less than 14 full days.

The Federal Court's decision, in *Thorson v Pine* [2004] FCA 1316, also emphasised that any notice to produce documents must specify "the purpose the inspector had in mind" when seeking the relevant documents, for example, to ascertain whether:

- the requirements of section/reg XYZ of the *Workplace Relations Act 1996* had been observed, or
- the XYZ Award 2004 (must specify the award) had been observed, or
- the requirements of the XYZ Award 2004 and Parts 9A and 9B of the *Workplace Relations Regulations 1996* had been observed.

A person is not excused from providing a document on the grounds that it may incriminate them (para 86(4B)).

Any documents produced or information provided directly or indirectly as a result of s86(1A)(c) cannot be used in any criminal proceeding (s86(4c)) other than for an action relating to s305 (Obstruction). However, as breaches of industrial instruments are civil matters, the documents or information can be used for OWS prosecution purposes.

If a person fails to produce records sought on accordance with s86(1A)(c), initiation action for a breach of section 305 (Obstruction) should be considered - see section 4.22 of this Guide.

State or Territory OWS Managers may wish to put procedures in place for the issue of para 86(1A)(c) notices – for example, that notices are cleared at an appropriate level.

#### Notices to be in Writing

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

#### *Not less than 14 days*

Care should be taken to ensure any 'notices to produce' provide the recipient with at least 14 full days to produce the document(s). As such, it should be common practice to make it 15 days or more, ending on a working day (i.e. not a weekend or public holiday).

### **4.22 Obstruction**

Obstruction can occur in three ways:

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

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

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

- (2) Circumstances periodically arise where an Adviser is denied access to documents necessary to determine observance with a federal award, Schedule 1A in Victoria, a certified agreement or the Act. When this occurs, the Adviser should advise the person of their authority and powers under the Act. Where access is still denied the Adviser should explain that it is an offence under the Act to obstruct an Adviser and that penalties apply (see section s86, 305 and regs 131L and 131M).

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

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

#### *Reasonable excuse*

It should be noted that the obstruction provision, ss 305(1), does not apply if the person has a reasonable excuse – ss305(2).

Although ss13.3(3) of the *Criminal Code* places the evidentiary burden on the defendant, it is prudent for Advisers to provide give employers reasonable opportunity to provide an excuse.

#### *Penalty*

The 6 month imprisonment penalty re section 305 is a maximum penalty (even if it doesn't expressly say so) and that Courts can translate it to a monetary penalty of up to \$3,300 - s4B of the Crimes Act 1914 (5 penalty units per month penalty)

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## 5. LITIGATION

### SECTION INDEX

- 5.1 Introduction
- 5.2 Quality Assurance
- 5.3 Litigation by the Department
- 5.4 Delegations for Approval of Litigation Action
- 5.5 Where Departmental Litigation is Not Approved
- 5.6 Where Court Imposed Penalties and/or Payments are Not Paid
- 5.7 Claimant/Employee Litigation
- 5.8 Small Claims Procedure
- 5.9 Sampling
- 5.10 Subpoena to Appear or Produce Documents
- 5.11 Legal Representation - Small Claims Matters
- 5.12 Matter Finalised
- 5.13 Appeals

### 5.1 Introduction

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

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

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

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

The following types of litigation are provided for:

#### *Departmental Litigation*

- Actions under s 178 of the Act, which have as their primary legislative purpose the seeking of a penalty for a breach of a provision (or provisions) of a federal award or a certified agreement.
-

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

#### *Employee Litigation*

- Employees can take their own actions under s178 and s179 of the Act, including by using the small claim procedure in accordance with s179D.
  - The role of suing for recovery of entitlements under s179 is given to employees, not the Adviser.
- Employees can also take their own common law/civil action under relevant State/Territory legislation.

## **5.2 Quality Assurance**

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

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

## **5.3 Litigation by the Department**

### *Offences under the Act*

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

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

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*Obstruction*

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

- must be heard in a court of competent jurisdiction, which includes the Federal Court or the Local Court exercising criminal jurisdiction;
- requires the offender to be a natural person; and
- should only be used:
  - where the person obstructing the Adviser has been provided with a reasonable opportunity to comply with the Adviser's directions (and does not have a reasonable excuse for not complying);
  - the obstruction involves an assault;
    - : where a physical assault occurs, the matter should be immediately reported to both the State/Territory OWS Manager and the Police. In such circumstances, advice should be sought by the State/Territory OWS Manager from the Department's Legal area on the most appropriate form of legal action to be taken. Liaison should also occur with OWS-NO;
  - the obstruction involves intimidation or threatening behaviour; or
  - the obstruction involves other behaviour considered serious enough to prejudice the Adviser being able to perform his or her duties, or which may encourage other persons to obstruct Advisers if action is not taken
    - : this includes where a party may systematically and/or unreasonably delay compliance or not comply with their lawful obligations (eg refusing to allow an inspection, not providing records within a reasonable period, etc).

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

*Breaches of Part 9A and 9B of the Regulations*

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

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

*Breaches of awards and certified agreements - Section 178 actions*



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

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

- whether the breach was wilful; taking into account factors such as the compliance history of the party, whether they acted in good faith or not, etc;
- whether the breach was serious in nature; taking into account factors such as the length of time the party failed to observe the provision(s), OH&S matters, the number of other people similarly affected, the degree to which the matter affected the claimant or others concerned, the amount of any underpayment(s), etc;
- the extent of any over-award or offsetting payments (also see 4.15 of this guide);
- the extent of compliance in a particular industry sector or with the particular provisions of a federal award; which may include consideration of the need to establish a precedent in a court of law;
- whether another party is taking or proposing to take similar action and/or whether the claimant has the capacity to initiate their own private action or initiate action through a union/employer organisation or with the assistance of another organisation;
- the strength of the evidence in a particular case, the likelihood of a penalty being granted by a court and the likelihood of recovery (eg, the company's solvency). In practical terms, it will sometimes be appropriate for the Department to place some weight on the desirability to recover entitlements;
- the likely cost of the action (this should not preclude litigation – it must be considered as just one (not major) factor in the overall context of a decision);
- previous court decisions which relate to the matter;
- any relevant legal advice relating to the matter; and
- depending on the circumstances of the case, any other considerations which might justify the Adviser taking litigation action.

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

#### *Other considerations*

#### *Small Claims Procedure - \$10,000 Limit*

Amounts of less than \$10,000 should generally be dealt with under the small claims procedure. However, if a particular case clearly warrants litigation action by the Department

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on the basis of the above criteria, the amount of \$10,000 should not be seen as a limit which precludes such action from being recommended or approved.

#### *Voluntary compliance*

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

#### *Restriction on obtaining additional evidence*

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

### **5.4 Recommendations to litigate**

#### *Submissions*

All recommendations to litigate should:

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

#### *Delegations for Approval of Litigation Action*

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

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

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

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### **5.5 Where Departmental Litigation is Not Approved**

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

### **5.6 Where Court Imposed Penalties and Payments are Not Paid**

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

### **5.7 Claimant/Employee Litigation**

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

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

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

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

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

### **5.8 Small Claims Procedure**

Where a claimant does not accept an offer of settlement or where no offer of voluntary settlement is made by the party in breach, the claimant (if an employee) can decide to

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proceed with a s.179 action using the small claims procedure under s.179D of the Act. It should be noted however that a court cannot award a payment exceeding \$10,000 under s.179D. In some States/Territories, it may be possible to settle matters under State/Territory legislation.

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

### 5.9 Sampling

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

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

### 5.10 Subpoena to Appear or Produce Documents

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

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

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

Where a subpoena is issued, the Adviser should:

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

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

### 5.11 Legal Representation - Small Claims Matters

In some jurisdictions, Magistrates may allow legal representation on request from either party. Under s.179D(2)(e) of the Act, if the court allows a party to be represented by counsel, the onus is on the court (not the Department) to ensure the other party is not disadvantaged. Where State/Territory OWS Managers have concerns about the operation of the s179D procedure in their State or Territory, they should consider:

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

### 5.12 Matter Finalised

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

### 5.13 Appeals

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

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## APPENDIX

## DEFINITIONS AND ABBREVIATIONS

|                            |   |
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| <b>Adviser</b>             | A person appointed as an inspector under s.84 of the Act, including State public servants who are given powers to exercise the functions of inspectors under s.84(3).   |
| <b>the Act</b>             | The <i>Workplace Relations Act 1996</i> and associated regulations.   |
| <b>AIR</b>                 | Australian Industrial Registry  |
| <b>AIRC</b>                | The Australian Industrial Relations Commission.   |
| <b>AWA</b>                 | An Australian workplace agreement approved under Part VID of the Act.   |
| <b>BIT</b>                 | Building Industry Taskforce   |
| <b>breach</b>              | A provision in a federal award, a certified agreement or relevant workplace relations legislation that has not been complied with as determined by an inspector/Adviser.  |
| <b>certified agreement</b> | An agreement certified under Division 4 of Part VIB of the Act and agreements (including enterprise flexibility agreements) certified or approved under the <i>Industrial Relations Act 1988</i> .  |
| <b>claim</b>               | An alleged breach of a federal award, certified agreement or the Act. Claims must be in writing from an identifiable person. Breaches detected through OWS initiated activities (eg targeted compliance/educative campaign) are treated as claims for the purposes of these guidelines. |
| <b>client</b>              | A person or body seeking information, advice or assistance from the Department and those to whom the Department seeks to provide a service (eg, employers who are the subject of a claim and those who form part of the target audience of our educative and information activities).   |
| <b>Contracted State</b>    | A State Government which has formally contracted to deliver federal award inquiry and compliance services on behalf of the Commonwealth (i.e. Queensland, South Australia, Western Australia and Tasmania).   |
| <b>correspondence</b>      | A written request for information, advice or assistance (including an alleged claim which is referred to a State) about the provisions of a federal award, Schedule 1A, a certified agreement or the Act.   |

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| <b>complaint</b>           | Formal contact from a client expressing dissatisfaction with the service they have received or the manner in which they have been dealt with by an officer or the Department.  |
| <b>not sustained</b>       | A claim is regarded as not sustained where the facts do not show that there has been a breach.   |
| <b>employee litigation</b> | Court action under s.178 or s.179 of the Act taken by an employee in order to seek a penalty or recover payments due under a federal award, Schedule 1A (s.506(2)) for Victorian employees or a certified agreement (see small claims procedure below). In some cases, it may be possible to settle matters under State legislation.   |
| <b>federal award</b>       | An award or order made and issued in writing by the AIRC under s.143(1) of the Act.  |
| <b>finalised claim</b>     | <p>A claim is regarded as finalised when it reaches one of the following resolutions:</p> <ul style="list-style-type: none"><li>- No prima facie breach (ie where after preliminary assessment the evidence does not show there has been a breach);</li><li>- not sustained (ie where evidence does not show there has been a breach);</li><li>- not proceeded with (ie A claim has received one of the following outcomes: the employee withdraws their claim; the matter does not fall within the federal jurisdiction; insolvency; OWS withdraws from the claim/case; etc)</li><li>- sustained, is an outcome of either:<ul style="list-style-type: none"><li>. voluntary compliance (see definition below);</li><li>. the claimant has been advised of their right to litigate their claim; or</li><li>. Department litigation approved,</li></ul>and the claimant has been advised in writing.</li></ul> <p><b>NOTE:</b> A claims is not considered finalised while OWS is taking action, other than litigation action, to recover payments.</p> <ul style="list-style-type: none"><li>- No further action (NFA) eg, employer insolvency; the Department withdraws the case; death of the employer/employee</li></ul> |
| <b>inquiry</b>             | A request for information, advice or assistance about the provisions of an award, agreement or workplace relations legislation. It includes matters handled over the counter, operator assisted calls, calls to  |

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|                               | interactive voice response units, correspondence, claim forms, emails and faxes. One inquiry might cover several questions.  |
| <b>inspector</b>              | A person appointed under s.84 of the Act, including State public servants who are given powers to exercise the functions of inspectors under s.84(3).  |
| <b>investigation</b>          | The process of assessing a claim, interviewing appropriate parties, providing reports and collecting evidence for prosecution purposes, if appropriate.  |
| <b>Ministerial Directions</b> | Directions made by the Secretary of the Department (under delegation from the Minister) under s.84(5) of the Act which specify how the powers or functions of inspectors are to be carried out, exercised or performed.  |
| <b>OEA</b>                    | Office of the Employment Advocate  |
| <b>OWS</b>                    | Office of Workplace Services. References to OWS will generally include the contracted States, unless specified otherwise.  |
| <b>Schedule 1A</b>            | Schedule 1A and Part XV of the Act outline the minimum terms and conditions of employment, including minimum wages, which apply to all employees in Victoria not covered by a federal award or agreement.                |
| <b>small claims procedure</b> | Court action under s.179 of the Act (using the s.179D procedure) taken by an employee against an employer in order to recover payments due under a federal award or a certified agreement, which do not exceed \$10,000. |
| <b>sustained</b>              | A claim is regarded as sustained when an officer is satisfied that at least one breach has occurred.   |
| <b>voluntary compliance</b>   | An outcome of a sustained claim where the employer has voluntarily rectified the breach(es).   |
| <b>Wageline Adviser</b>       | A person performing the function of a Wageline operator.   |

**NOTE:** Some of the above definitions vary slightly from the definitions contained in OWS' contracts with Contracted States and those in the Workplace Relations Ministers' Council's report on Benchmarking of Commonwealth and State Workplace Relations Inquiry and Compliance Services. In respect of the Contracted States, the definitions in their contracts prevail to the extent of any inconsistencies.

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