



**Fair Work**  
OMBUDSMAN

# Litigation Policy



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# Background

The Fair Work Ombudsman (FWO) is the head of the Office of the Fair Work Ombudsman, an independent statutory agency created by the *Fair Work Act 2009* (Cth) (FW Act). The FWO's role is to promote harmonious, productive and cooperative workplace relations. The FWO also monitors, inquires into, investigates, and enforces compliance with relevant Commonwealth workplace laws.

The Litigation Policy (Policy) explains how the FWO decides to commence, and will conduct, civil court proceedings for alleged breaches of Commonwealth workplace laws.<sup>1</sup> The Policy is to be read in conjunction with the FWO's obligations under the *Legal Services Directions 2017* (Cth) (Legal Services Directions) issued by the Attorney General under section 55ZF of the *Judiciary Act 1903* (Cth).

The Policy does not apply to criminal offences. The Commonwealth Department of Public Prosecutions (CDPP) is responsible for criminal prosecutions. Where we believe that a criminal offence has been committed, we may refer the matter to the CDPP.

## Why we litigate

Commencing legal proceedings, which we refer to as "litigation", is one of several enforcement tools available to the FWO, all of which are aimed at bringing about compliance with Commonwealth workplace laws.

As set out in our Compliance and Enforcement policy, litigation is generally reserved for more serious cases of non-compliance. Litigation is an essential enforcement tool for three reasons:

- enforcing the law and obtaining Court orders sends a powerful public message to others not to engage in similar conduct (general deterrence);
- stopping people from engaging in unlawful behaviour now and in the future makes the need to comply with Commonwealth workplace laws real for individuals (specific deterrence); and
- clarifying the law helps the community understand the various obligations and rights arising from Commonwealth workplace laws.

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<sup>1</sup> Commonwealth workplace laws enforced by the FWO include the FW Act, *Fair Work Regulations 2009* (Cth) and the *Paid Parental Leave Act 2010* (Cth).

The FWO is more likely to litigate in cases involving:

- deliberate and/or repeated non-compliance with Commonwealth workplace laws;
- exploitation of vulnerable workers;
- failure to cooperate with us and fix breaches after being given the opportunity to do so; and/or
- parties who have a prior history of breaches who have not taken adequate steps to ensure compliance despite being advised of the consequences in the past.

Even in circumstances where breaches have been fixed, it may still be appropriate for the FWO to commence legal proceedings.

## Who we litigate against

Liability for breaches of Commonwealth workplace laws may lie with more than just one person or body. Section 550 of the FW Act describes how a person can be “involved in” a breach, and says that such persons are treated as having committed a breach themselves.

We may commence legal proceedings and seek orders against any person who breaches their obligations under Commonwealth workplace laws, as well as those who are “involved” in such breaches.

This might include:

- employers;
- registered organisations;
- company directors or company secretaries;
- officials of organisations;
- human resources managers or other managers;
- external agents or advisors, such as accountants, bookkeepers or external human resources consultants;
- companies and people involved in supply chains involving the procurement of labour;
- a holding company of a subsidiary employing entity or its directors; and/or
- a franchisor.

We encourage workplace participants to engage with us and to seek advice and assistance about their rights and obligations under Commonwealth workplace laws. The reliability of our advice is dependent on the information you provide to us. If we provide incorrect advice about minimum wages or conditions of employment, and that advice is relied on and followed in good faith, we will not pursue penalties for the period of non-compliance before the person is advised of the mistake. Further details are set out in [Our commitment to you](#).

## Commencing or intervening in proceedings

### 1. Sufficient evidence and public interest

The FWO will only commence proceedings if it considers that there is sufficient evidence to do so and it would be in the public interest. Except in exceptional circumstances, the FWO will usually commence proceedings after it has written legal advice indicating that there are reasonable grounds for initiating the proceedings.

In deciding whether to institute any appeal, the FWO will consider whether there are reasonable prospects of success and whether the appeal is in the public interest.

As a regulator utilising public funds, the FWO will consider the impact on its resources and costs before making a decision to commence first instance proceedings or an appeal.

The public interest factors the FWO considers in determining to commence, or not commence, litigation varies depending on the particular circumstances of each case. The following table sets out some of the matters the FWO typically considers.

Public interest factors	Examples of matters to consider
<b>Nature, seriousness and circumstances of the alleged breaches</b>	<ul style="list-style-type: none"> <li>■ The seriousness of the alleged breaches</li> <li>■ Prevalence in the community of the type of behaviour</li> <li>■ Any mitigating or aggravating circumstances</li> <li>■ Whether the employer sought and relied on relevant professional advice</li> <li>■ Evidence of deliberate or reckless conduct including omitting to take steps to ensure compliance</li> <li>■ Whether breaches have been admitted and/or fixed</li> </ul>
<b>Characteristics of person(s) alleged to have committed the breaches</b>	<ul style="list-style-type: none"> <li>■ Compliance history</li> <li>■ Business experience and size</li> <li>■ Any special vulnerability</li> <li>■ Whether the person has actively assisted the FWO's inquiries and whether they genuinely accept their non-compliance</li> <li>■ What steps they have taken to prevent further breaches</li> </ul>
<b>Characteristics of person(s) affected by the alleged breaches</b>	<ul style="list-style-type: none"> <li>■ Any special vulnerability, such as whether the person has a disability, young or mature workers, visa status or from a culturally and linguistically diverse background, for example, indigenous people</li> <li>■ Whether the person has the ability and resources to commence their own proceedings</li> </ul>
<b>Impact of the alleged breaches</b>	<ul style="list-style-type: none"> <li>■ Direct and indirect impact on the people who have been affected by the breaches</li> <li>■ Impact on any other person(s), including other businesses/competitors</li> <li>■ The impact of the breaches and their size, such as the number of people affected or the quantum of any underpayments</li> </ul>
<b>Impact of litigation on general and specific deterrence</b>	<ul style="list-style-type: none"> <li>■ Whether litigation will reduce the likelihood that others will engage in similar behaviour (general deterrence)</li> <li>■ Whether litigation will reduce the likelihood of further breaches of workplace laws by the person(s) involved in the proceedings (specific deterrence)</li> </ul>
<b>Effect of litigation</b>	<ul style="list-style-type: none"> <li>■ Availability and efficacy of, or any alternatives to, litigation</li> <li>■ Likely outcome in the event the breaches are found to have occurred (eg. penalties, compensation or other orders)</li> <li>■ Whether the likely outcome would be unduly harsh or oppressive</li> </ul>
<b>Administration of justice</b>	<ul style="list-style-type: none"> <li>■ Passage of time since the alleged breaches</li> <li>■ Likely length and cost of litigation</li> <li>■ Whether proceedings are necessary to maintain public confidence in the administration of workplace laws</li> </ul>

## 2. Impartial decision making

The FWO's decision to commence or not commence proceedings must be made impartially and must not be influenced by any inappropriate consideration of race, religion, sex, national origin or political association. The decision must not be influenced by any political advantage or disadvantage to the Government, any political group or party or any union, industrial or employer group or association.

## Conduct of proceedings

The FWO will conduct litigation honestly, fairly, consistently and in accordance with the Commonwealth's Obligation to Act as a Model Litigant (Appendix B to the Legal Services Directions).

The FWO will make decisions about the conduct of litigation on the basis of the available evidence. If another party asks the FWO to agree to a particular course or to put a submission to the Court, we may ask them to provide us with evidence to support their request.

Where evidence discloses a number of potential breaches of Commonwealth workplace laws, the FWO will take care to plead the breaches which adequately reflect the nature and extent of the relevant behaviour. Where the FWO alleges there have been serious contraventions within the meaning of section 557A of the FW Act, we will specify the relevant serious contraventions.

After proceedings have been commenced, the FWO participates in discussions to limit any issues in dispute, for example, during Court mediations. As a regulator, the FWO approaches such discussions from a public interest perspective. In circumstances where a party provides new evidence alleging that the breach(es) did not occur, the FWO will consider the evidence and may:

- proceed with the original breaches;
- proceed in relation to fewer breaches than originally identified; and/or
- accept admissions only in relation to some breaches and not press or seek orders in relation to other breaches. All admissions must reflect a genuine acceptance of responsibility.

We will discontinue legal proceedings if it is appropriate to do so. It will be rare for us to make this decision, given the detailed assessment we undertake before we commence proceedings.

Admissions or payments made just before or after proceedings are commenced will usually not justify discontinuing the proceedings but the FWO will take such action into account when seeking orders and making submissions to the Court on appropriate penalties.

# Orders and penalties

The FW Act allows eligible Courts to make a wide range of orders if a person is found to have breached the FW Act. Orders that the FWO may seek in proceedings include orders:

- that underpayments be rectified and interest be paid;
- that compensation be paid to person(s) affected by the breaches. Such compensation would be paid by person(s) responsible for breaches and/or other persons who were “involved” in them;
- for a civil penalty to be paid to the Commonwealth<sup>2</sup> or, where appropriate, the penalty be redirected to an impacted party;
- that a person pay any civil penalty personally, without seeking or accepting indemnity from a third party;
- for injunctions to stop, prevent or restrain further breaches from occurring; and/or
- that a person take specific steps, for example by undertaking training or conducting wage audits.

## 1. Submissions on penalty

The Courts are responsible for deciding what orders are appropriate in a case and the amount of any civil penalty. Courts may have regard to submissions made by the parties to proceedings in relation to penalty, including as to what facts are relevant.<sup>3</sup> The FWO may put evidence before the Court to support our submissions on penalty, including evidence about compliance in particular industries, places or amongst particular groups of workplace participants.

The FWO will seek penalties that:

- are proportionate to the nature of the behaviour;
- will achieve general and specific deterrence; and
- avoid a harsh or oppressive outcome.

In appropriate cases, we may reach agreement with other parties about the amount of penalty to ask the Court to order. The Court may accept the agreed penalty if it is satisfied that the amount is appropriate.<sup>4</sup>

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<sup>2</sup> As a result of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, the maximum penalties for serious contraventions, within the meaning of s.557A of the FW Act, are higher than for other contraventions of the FW Act.

<sup>3</sup> *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (**Commonwealth v FWBII**) at [46]-[64] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ).

<sup>4</sup> *Commonwealth v FWBII* at [48], [57]-[59] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ).

## 2. Discounts on penalty

Courts may reduce the penalty to be ordered if a person admits the breaches and cooperates with the Court process.<sup>5</sup> We will draw the Court's attention to any conduct that justifies a discount on penalty, in particular any admissions made early in the course of an investigation or soon after the commencement of proceedings. If admissions are made close to or during the Court hearing, we may submit to the Court that a lesser or no discount on penalty is appropriate.

## 3. Costs

Under the FW Act, parties to litigation will normally pay their own costs of the proceeding. However, the Court can order a party to pay someone else's costs in some circumstances, such as when a party has acted unreasonably. In appropriate cases, the FWO may seek orders that a party pay costs.

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<sup>5</sup> *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [74]-[76] (per Stone and Buchannan JJ).

# Publicising enforcement outcomes

As set out in our [Media Policy](#), the FWO publishes information regarding our enforcement activities on our website. This forms an important part of our role in ensuring compliance with Commonwealth workplace laws by:

- enhancing general and specific deterrence; and
- informing and educating the community, or people in the same and similar industries, of the nature and outcome of enforcement activities.

The FWO may decide to publish information about specific litigation matters, including by issuing media statements and using information in reports, presentations or other educative material. Information published by the FWO will be fair, accurate and timely.

In litigation matters, the FWO may issue a media statement in relation to the commencement of proceedings, after a decision or finding is made or where there is public interest to do so. The FWO will publish information if we believe that publicising any or all of these stages will support compliance with Commonwealth workplace laws.

The FWO publishes this information for two reasons:

- visibility of our enforcement activity sends a message of deterrence to others and promotes compliance; and
- to ensure transparency through informing the public of compliance and enforcement activities undertaken by the FWO.

The Courts have accepted that it is part of our role as a regulator to publicise our compliance activities.<sup>6</sup> Being the subject of unfavourable media attention usually will not justify a reduction in penalty for a person who has breached workplace laws.<sup>7</sup>

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<sup>6</sup> *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 at 82; *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 at 65; *Fair Work Ombudsman v Cleaners New South Wales Pty Ltd* [2009] FMCA 683 at [24]-[25].

<sup>7</sup> *Fair Work Ombudsman v South Jin Pty Ltd (No 2)* [2016] FCA 832 at [77]; *Cousins v Merringtons Pty Ltd (No 2)* [2008] VSC 340 at [59]-[65].