

Guidance Note No.	3	Guidance Note Title	FWO Compliance Notice Policy
Publication History		Relevant legislation or materials	<i>Fair Work Act 2009</i> <i>GN1: FWO Litigation Policy, 1st Edition (1 July 2009)</i> <i>GN4: FWO Enforceable Undertakings Policy</i>
First edition	17 December 2009		

1. The purpose of FWO Guidance Notes

- 1.1. Guidance Notes are a means by which the Office of the Fair Work Ombudsman (**FWO**) publishes and disseminates advice on the interpretation of the laws it enforces or about its internal policies and or procedures.
- 1.2. The FWO will publish Guidance Notes from time to time on a range of subject matters concerning the *Fair Work Act 2009* (**FW Act**). The general public are welcome to suggest subject matter for future Guidance Notes.

2. This Guidance Note

- 2.1. This Guidance Note sets out guidelines to be followed by the FWO in the making of decisions relating to Compliance Notices under section 716 of the FW Act, and the use of such Compliance Notices. It is to be referred to as:
 - (a) Guidance Note 3; or
 - (b) the FWO Compliance Notice Policy.
- 2.2. This Guidance Note is to be read in conjunction with Guidance Note 1 - FWO Litigation Policy and Guidance Note 4 – FWO Enforceable Undertakings Policy.
- 2.3. This Guidance Note addresses the following topics:
 - (a) The purpose of FWO Guidance Notes (paragraph 1);
 - (b) This Guidance Note (paragraph 2);
 - (c) About the Fair Work Ombudsman (paragraph 3);
 - (d) Compliance Notices as a compliance tool under the FW Act (paragraph 4);
 - (e) When a Fair Work Inspector will issue a Compliance Notice (paragraph 5);
 - (f) Contents of a Compliance Notice (paragraph 6);

- (g) Review of Compliance Notices (paragraph 7);
 - (h) Consequences of complying with a Compliance Notice (paragraph 8);
 - (i) Consequences of failing to comply with a Compliance Notice (paragraph 9);
 - (j) Compliance Notices and Enforceable Undertakings (paragraph 10);
 - (k) Compliance Notices and FWO litigation (paragraph 11).
 - (l) Publishing and utilising enforcement activity (paragraph 12).
- 2.4. The purpose of this Guidance Note is two-fold. First, it operates as a guide for the FWO and Fair Work Inspectors in the exercise of their functions relating to Compliance Notices. Secondly, it aims to provide the community with a better understanding of the manner in which the FWO exercises those functions.
- 2.5. However, this Guidance Note does not have the force of statute. Accordingly, nothing in this Guidance Note compels a Fair Work Inspector to issue a Compliance Notice or prevents a Fair Work Inspector from issuing a Compliance Notice. Any failure by a Fair Work Inspector to act in accordance with this Guidance Note does not affect the validity of any action in relation to Compliance Notices.

3. About the Fair Work Ombudsman

- 3.1. The Fair Work Ombudsman, Nicholas Wilson, is a statutory office holder pursuant to section 681 of the FW Act.
- 3.2. The Office of the Fair Work Ombudsman is a statutory office pursuant to section 696 of the FW Act.
- 3.3. Prior to the commencement of operations of the FWO on 1 July 2009, the FWO's functions were largely fulfilled by the Office of the Workplace Ombudsman (previously the Office of Workplace Services (**OWS**)) and the Workplace Authority (previously the Office of the Employment Advocate (**OEA**)). Prior to 27 March 2006 the functions were fulfilled by the then Department of Employment and Workplace Relations. The FWO is independent of the management of the Department of Education, Employment and Workplace Relations.
- 3.4. In broad terms, the FWO:
- (a) promotes harmonious, productive and cooperative workplace relations;
 - (b) assists employees and employers to understand their rights and obligations;

- (c) provides advice and disseminates information;
- (d) promotes and monitors compliance with Commonwealth workplace laws;
- (e) investigates complaints;
- (f) inquires into, and investigates, any act or practice that may be contrary to Commonwealth workplace laws;
- (g) commences proceedings or makes applications to enforce Commonwealth workplace laws and, where appropriate, seeks a penalty for contravention of Commonwealth workplace laws; and
- (h) represents workers who are, or might become, a party to proceedings.

3.5. The Fair Work Ombudsman appoints Fair Work Inspectors empowered to investigate and enforce compliance with a range of Commonwealth workplace laws including, but not limited to, employees' terms and conditions of employment under the FW Act and various instruments.

4. Compliance Notices as a compliance tool under the FW Act

4.1. A Compliance Notice is a tool available to the FWO in cases where a Fair Work Inspector reasonably believes that a person has contravened a provision of:

- (a) a provision of the National Employment Standards¹;
- (b) a term of a modern award²;
- (c) a term of an enterprise agreement
- (d) a term of a workplace determination
- (e) a term of a national minimum wage order; or
- (f) a term of an equal remuneration order (collectively referred to as '**entitlement provisions**')

4.2. A Compliance Notice can only be issued in relation to contraventions occurring on and from 1 July 2009.

4.3. The issue of a Compliance Notice is an alternative to the FWO commencing proceedings (see Guidance Note 1) or accepting an undertaking in relation to a suspected contravention (see Guidance Note 4).

¹ The National Employment Standards apply from 1 January 2010.

² Modern awards operate from 1 January 2010 or such later date as may be specified in the modern award.

- 4.4. A Fair Work Inspector's capacity to issue Compliance Notices forms part of a broader compliance system and comprises a combination of positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws.
- 4.5. As part of the FWO's compliance system the FWO provides information and education to encourage voluntary compliance with Commonwealth workplace laws. Where appropriate the FWO will move to a formal investigation of alleged contraventions of Commonwealth workplace laws. Where a contravention is identified enforcement measures (including in appropriate cases, the issue of Compliance Notices, the acceptance of Enforceable Undertakings or the commencement of proceedings) may be used to secure compliance.

5. When a Fair Work Inspector will issue a Compliance Notice

- 5.1. If a Fair Work Inspector reasonably believes that a person has contravened an entitlement provision the Fair Work Inspector may issue a Compliance Notice under section 716 of the FW Act as an alternative to other enforcement measures including FWO litigation action.
- 5.2. The FWO will consider giving a person a Compliance Notice where the issue of a Compliance Notice would offer the more effective regulatory outcome. The issue of a Compliance Notice may offer the more effective regulatory outcome where rectification of the breach and specific deterrence can be achieved without the expense and delay associated with litigation. In particular, a Compliance Notice may be a more effective regulatory outcome where it ensures that persons who have suffered loss or damage as a result of the contravention of the civil remedy provision are swiftly compensated.
- 5.3. The FWO can not issue a Compliance Notice in circumstances where an Enforceable Undertaking has been given in relation to the contravention (see paragraph 9 below).

6. Contents of a Compliance Notice

- 6.1. A Compliance Notice must require the alleged wrongdoer, within such reasonable time as is specified in the Notice, to:
 - (a) take specified action to remedy the direct effects of the contravention; and/or
 - (b) produce reasonable evidence of compliance with the Notice.

- 6.2. A Compliance Notice will ordinarily specify a period of at least **14 days** for the actions under the Notice to be taken and / or the evidence of compliance to be produced. However, a Fair Work Inspector may take into account the usual pay periods or banking cycles of the person to whom a Compliance Notice is to be issued when determining a reasonable timeframe for compliance. Where appropriate, a Compliance Notice may specify that instalment payments be made to remedy the direct effects of the contravention.
- 6.3. Where the direct effect of the contravention is, for example, an underpayment, the Compliance Notice will specify the particular employee(s) to whom entitlements are owed and the monetary value of those entitlements that must be paid to the employee(s) in order to remedy the direct effects of the contravention.
- 6.4. A Compliance Notice cannot require the alleged wrongdoer to do something other than remedy the direct effects of the contravention in relation to which the Notice is given. For example, a Compliance Notice cannot require an employer to audit all of its employee records to ensure ongoing compliance with applicable laws and industrial instruments. Such a requirement could more appropriately be dealt with by other means such as an Enforceable Undertaking.
- 6.5. In addition, the Compliance Notice must:
- (a) set out the name of the person to whom the Notice is given;
 - (b) set out the name of the Fair Work Inspector who gave the Notice;
 - (c) set out brief details of the contravention;
 - (d) explain that a failure to comply with the Notice may contravene a civil remedy provision of the FW Act; and
 - (e) explain that the person may apply to a court for review of the Notice (see paragraph 7 below).

7. Review of Compliance Notices

- 7.1. A person who is given a Compliance Notice by a Fair Work Inspector may apply under section 717 of the FW Act to the Federal Court, the Federal Magistrates' Court or an eligible State or Territory Court for a review of the Notice on either or both of the following grounds:
- (i) the person has not committed a contravention set out in the Notice (eg where the provision or term that the person is alleged to have

breached does not apply to the person or simply because the alleged contravention did not occur);

- (ii) the Notice does not comply with section 716(2) or 716(3) of the FW Act relating to the required contents of a Compliance Notice (see paragraph 5 above) (eg the Notice is procedurally deficient or it requires a person to do something more than is necessary to remedy the direct effects of a contravention).

7.2. The court may stay the operation of a Compliance Notice while it is being reviewed under section 717 and, after reviewing the Notice, the court may confirm, cancel or vary the Notice. If the court decides not to stay the operation of a Compliance Notice, the person to whom it is directed is required to comply with the Notice even though it may be subject to review. However, a Fair Work Inspector cannot commence proceedings in relation to the alleged contravention that gave rise to the Compliance Notice while the Compliance Notice is subject to review.

7.3. In addition to review of a Compliance Notice under section 717 of the FW Act, other rights of review may be available to a recipient of a Compliance Notice. Recipients should seek their own legal advice about the availability of such rights.

8. Consequences of complying with a Compliance Notice

8.1. The fact that a person complies with a Compliance Notice cannot give rise to adverse inferences being drawn against that person.

8.2. Specifically, complying with a Compliance Notice does not give rise to an inference that the recipient of the Compliance Notice:

- (a) admits the contravention alleged in the Compliance Notice; or
- (b) committed the contravention specified in the Compliance Notice.

8.3. Once a person complies with a Compliance Notice, FWO cannot commence proceedings in relation to the alleged contravention specified in the Compliance Notice.

9. Consequences of failing to comply with a Compliance Notice

- 9.1. A person who is given a Compliance Notice by a Fair Work Inspector must comply with the Notice. Failure to do so constitutes a contravention of a civil remedy provision of the FW Act (subsection 716(5)).
- 9.2. Where a person fails to comply with the Compliance Notice, a Fair Work Inspector may:
 - (a) withdraw the Notice; and
 - (b) commence proceedings seeking:
 - remedies and penalties for the contravention of the entitlement provision (i.e. the contravention in respect of which the Compliance Notice was issued); and
 - penalties for the failure to comply with the Compliance Notice.
- 9.3. The maximum penalty for failure to comply with a Compliance Notice is \$16,500 for a body corporate or \$3,300 for an individual.
- 9.4. A person does not contravene subsection 716(5) if they have a reasonable excuse for failing to comply with a Compliance Notice. A reasonable excuse could include a physical or practical difficulty in complying with the Compliance Notice such as being unable to find the person to whom payments are to be made or the payment being delayed because, for example, the employee's banking details were incorrect or the employee's account had closed. The recipient of the Compliance Notice bears the burden of proving that the person had a reasonable excuse for failing to comply with the Compliance Notice.
- 9.5. In considering whether to commence proceedings in relation to the non-compliance with a Compliance Notice the FWO will have regard to any reasons for non-compliance, any actions evidencing attempted compliance and the alleged wrongdoer's attitude and degree of cooperation.
- 9.6. Non-compliance with a Compliance Notice may also be taken into account by the FWO in any future dealings involving the recipient of the Notice.

10. Compliance Notices and Enforceable Undertakings

- 10.1. A Fair Work Inspector must not issue a Compliance Notice to a person in relation to a contravention where the FWO has already accepted an Enforceable Undertaking in relation to that contravention and the Enforceable Undertaking

has not been withdrawn. This ensures that the FWO cannot pursue multiple enforcement mechanisms in relation to the same contravention.

11. Compliance Notices and FWO Litigation

- 11.1. A Fair Work Inspector cannot commence proceedings against a person for contravention of a civil remedy provision of the FW Act, where the person has been issued with a Compliance Notice in relation to the contravention and either:
- (a) the Notice has not been withdrawn and the person has complied with it; or
 - (b) the person has sought a review of the Notice under section 717 and that process has not been completed.
- 11.2. Again, this is to ensure that multiple enforcement mechanisms are not pursued and to ensure that a person had an opportunity to seek review of a Compliance Notice without being exposed to FWO litigation action.
- 11.3. However, a Fair Work Inspector's issue of a Compliance Notice in no way impedes the ability of another party (other than the FWO) with standing to bring proceedings in relation to an alleged contravention that is the subject of the Compliance Notice. This means, for example, that an employee affected by a breach of a fair work instrument could make an application under section 539 of the FW Act for orders and penalties in relation to the contravention.
- 11.4. This means that pecuniary penalties could be imposed by a court on a person that has complied with a Compliance Notice or on a person that has sought review of a Compliance Notice. A court can not take into account a person's compliance with a Compliance Notice for the purpose of determining whether the person had committed the alleged contravention. However, a court could take into account the person's compliance when considering whether to impose a penalty or in considering the size of the penalty to be imposed.
- 11.5. A Fair Work Inspector may continue investigations and, where appropriate, commence proceedings in relation to any matter that lies outside the scope of the Compliance Notice.

12. Publishing and utilising enforcement activity

- 12.1. All parties affected by an alleged contravention of a civil remedy provision may be informed of the Fair Work Inspector's issue of a Compliance Notice in relation to that contravention and of any subsequent process in relation to that Compliance Notice such as withdrawal, review or confirmation.

- 12.2. The FWO may use information about its enforcement activities, including the issue of Compliance Notices, in order to inform future inspection and audit activity, particularly on a systemic level. The FWO reserves the right to publish information about Compliance Notices it has issued, including identifying employers who have been the subject of such notices and the nature of the contraventions involved.
- 12.3. The FWO may also publish general information about its enforcement activities, including the issue of Compliance Notices in a particular industry, in order to enhance specific and general deterrence.

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