

<b>Guidance Note No.</b>	4	<b>Guidance Note Title</b>	FWO Enforceable Undertakings Policy
<b>Publication History</b>		<b>Relevant legislation or materials</b>	<i>Fair Work Act 2009</i> <i>GN1: FWO Litigation Policy, 1<sup>st</sup> Edition (1 July 2009)</i> <i>GN3: FWO Compliance Notice Policy</i>
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## 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 Enforceable Undertakings under section 715 of the FW Act, and the use of such Enforceable Undertakings. It is to be referred to as:
  - (a) Guidance Note 4; or
  - (b) the FWO Enforceable Undertaking Policy.
- 2.2. This Guidance Note is to be read in conjunction with Guidance Note 1 - FWO Litigation Policy and Guidance Note 3 – FWO Compliance Notices 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) Enforceable Undertakings as a compliance tool under the FW Act (paragraph 4);
  - (e) When the Fair Work Ombudsman will accept an Enforceable Undertaking (paragraph 5);

- (f) Contents of an Enforceable Undertaking (paragraph 6);
- (g) Variation and withdrawal of an Enforceable Undertaking (paragraph 7);
- (h) Failure to comply with an Enforceable Undertaking (paragraph 8);
- (i) Enforceable Undertakings and Compliance Notices (paragraph 9);
- (j) Enforceable Undertakings and FWO Litigation (paragraph 10);
- (k) Publishing and utilising enforcement activity (paragraph 11).

2.4. The purpose of this Guidance Note is two-fold. First, it operates as a guide for the Fair Work Ombudsman in the exercise of their functions relating to Enforceable Undertakings. Secondly, it aims to provide the community with a better understanding of the manner in which the Fair Work Ombudsman exercises those functions.

2.5. This Guidance Note does not have the force of statute. Accordingly, nothing in this Guidance Note compels the Fair Work Ombudsman to accept an Enforceable Undertaking or to refuse to accept an Enforceable Undertaking. The validity of any action in relation to Enforceable Undertakings is not affected by any failure of the Fair Work Ombudsman or FWO to act in accordance with this Guidance Note.

### **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.

#### **4. Enforceable Undertakings as a compliance tool under the FW Act**

- 4.1. An Enforceable Undertaking is an enforcement mechanism available to the FWO where the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision.
- 4.2. The acceptance of an Enforceable Undertaking is an alternative to the FWO commencing proceedings (see Guidance Note 1) or where applicable issuing a Compliance Notice (see Guidance Note 3). It may also be a method of formalising an arrangement where a wrongdoer has voluntarily complied with the law after an investigation by a Fair Work Inspector.
- 4.3. The Fair Work Ombudsman's capacity to accept Enforceable Undertakings forms part of a broader compliance system comprising a combination of positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws.
- 4.4. 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 investigate alleged contraventions of Commonwealth workplace laws. Where a contravention is identified enforcement measures (including in appropriate cases, the acceptance of Enforceable Undertakings, the issue of Compliance Notices, or the commencement of proceedings) may be used to secure compliance.

## 5. When the Fair Work Ombudsman will accept an Enforceable Undertaking

- 5.1. The Fair Work Ombudsman may accept a written undertaking under section 715 where the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision of the FW Act. Enforceable Undertakings are accepted as an alternative to other enforcement measures including FWO litigation. Their purpose is to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention, and/or prevent a similar contravention in the future.
- 5.2. The Fair Work Ombudsman will consider acceptance of an Enforceable Undertaking where:
  - The FWO reasonably believes the person has contravened a civil remedy provision of the FW Act;
  - it is in the public interest and appropriate in all the circumstances to resolve the matter through a formal enforcement outcome; and
  - the contravention is admitted and the alleged wrongdoer is willing to cooperate with the FWO.
- 5.3. A relevant consideration in determining the public interest will be whether or not the objectives of other compliance tools (namely rectification of the contravention, general and specific deterrence) can be achieved through the acceptance of an Enforceable Undertaking, without, for example, the expense and delay associated with litigation. Factors relevant to determining public interest are dealt with in detail in Guidance Note 1 - FWO Litigation Policy.
- 5.4. An Enforceable Undertaking will not be accepted by the Fair Work Ombudsman where it does not offer a more effective regulatory outcome. An Enforceable Undertaking is considered to be a more effective regulatory outcome where it produces an efficient result that compensates those persons who have suffered loss or damage as a result of the contravention or where it offers opportunities to ensure continuing compliance that may not be available via an order from a court. An Enforceable Undertaking may provide the most effective and flexible enforcement mechanism as a range of compliance outcomes can be achieved. Enforceable Undertakings are not considered an appropriate enforcement mechanism to deal with trivial matters.
- 5.5. A person wishing to enter into an Enforceable Undertaking with the Fair Work Ombudsman should first discuss it with the Fair Work inspector assigned to the

investigation. Once the offer has been made and the terms of any Enforceable Undertakings discussed, the decision to accept or reject the offer is a formal decision made by the Fair Work Ombudsman or his approved delegate, under a Delegation of Powers and Functions signed by the Fair Work Ombudsman on 2 July 2009. In making the decision the Fair Work Ombudsman, or his approved delegate, will have regard to whether the Enforceable Undertaking provides the more effective regulatory outcome.

5.6. A decision by the Fair Work Ombudsman, or his approved delegate, to accept any Enforceable Undertaking does not create a precedent binding on the FWO. The Fair Work Ombudsman will not accept an Enforceable Undertaking merely because it has previously accepted an Enforceable Undertaking from the same person or another person in relation to a similar contravention.

5.7. The Fair Work Ombudsman cannot accept an Enforceable Undertaking in circumstances where a Compliance Notice has been given in relation to the contravention (see paragraph 9 below). The Fair Work Ombudsman cannot accept an Enforceable Undertaking in relation to any conduct that gives rise to a criminal offence under the FW Act (see for example, section 675).

## 6. Contents of an Enforceable Undertaking

6.1. An Enforceable Undertaking takes the form of a written deed executed by both the alleged wrongdoer and the Fair Work Ombudsman.

6.2. In an Enforceable Undertaking the wrongdoer must:

- admit the contravention, which must be described in detail in the Enforceable Undertaking;
- agree to remedy the contravention in the manner specified (through payment(s) to rectify underpayment) and identify the timeframe within which the contravention will be remedied;
- specify any other actions which the wrongdoer agrees to undertake and the timeframe within which those actions will be taken; and
- acknowledge that application may be made to a court by the Fair Work Ombudsman for orders against the wrongdoer if the wrongdoer fails to comply with the Enforceable Undertaking.

6.3. An Enforceable Undertaking may contain a broad range of commitments on the part of the wrongdoer, including, for example, participation in an FWO education program, the provision of training for managers and staff, completion of regular

audits and compliance plans, management plans for work systems and/or keeping the FWO informed of ongoing steps taken to ensure compliance with Commonwealth workplace laws. The Enforceable Undertaking may also require the wrongdoer to publish a public notice about the contraventions and the remedial action they have undertaken to carry out.

- 6.4. The Fair Work Ombudsman will not accept an Enforceable Undertaking that either fails to admit the contravention or contains a clause denying the contravention.

## **7. Variation or withdrawal of an Enforceable Undertaking**

- 7.1. Once an Enforceable Undertaking has been entered into, a person who has given the Enforceable Undertaking may only withdraw or vary the Enforceable Undertaking with the Fair Work Ombudsman's consent (section 715(3)). The Fair Work Ombudsman's consent will only be given in writing. The Fair Work Ombudsman will only consent to vary or withdraw an Enforceable Undertaking where the wrongdoer can demonstrate:

- compliance with the Enforceable Undertaking is impractical or ineffective; or
- there has been a relevant material change which renders variation or withdrawal of the Enforceable Undertaking appropriate in all the circumstances.

- 7.2. The Fair Work Ombudsman will not consent to the variation or withdrawal of an Enforceable Undertaking where the Fair Work Ombudsman considers that doing so could undermine the stated objects of the FW Act.

- 7.3. An Enforceable Undertaking will not be withdrawn merely because the wrongdoer has complied with the Enforceable Undertaking.

- 7.4. The Fair Work Ombudsman will not usually consent to the variation of an Enforceable Undertaking to extend the period of time by which the wrongdoer is required to comply with the Enforceable Undertaking. However, if a person requests an extension of time and the Fair Work Ombudsman considers that the wrongdoer has genuine and compelling reasons for their failure to comply with the specified time limits, the Fair Work Ombudsman may consent to the variation.

## **8. Failure to comply with an Enforceable Undertaking**

- 8.1. In the event of non-compliance with an Enforceable Undertaking the Fair Work Ombudsman may apply to the Federal Court, the Federal Magistrates' Court or an eligible State or Territory Court for an order directing the wrongdoer to comply

with the terms of the Enforceable Undertaking. The court may also make an order directing the wrongdoer to pay compensation to a person who has suffered loss because of the contravention of the Enforceable Undertaking, and any other orders that the court considers appropriate.

- 8.2. Contravention of an Enforceable Undertaking does not itself attract a civil remedy.

## **9. Enforceable Undertakings and Compliance Notices**

- 9.1. The Fair Work Ombudsman cannot accept an Enforceable Undertaking in relation to a contravention of a civil remedy provision, where a Compliance Notice has already been issued under section 716 of the FW Act. This ensures that the FWO cannot pursue multiple enforcement mechanisms in relation to the same contravention.

## **10. Enforceable Undertakings and FWO Litigation**

- 10.1. The Fair Work Ombudsman cannot commence proceedings against a person for contravention of a civil remedy provision where the person has given an Enforceable Undertaking in relation to the contravention, unless the Enforceable Undertaking has been withdrawn. This ensures that multiple enforcement mechanisms are not pursued by the FWO in relation to the same contravention. If the Enforceable Undertaking is withdrawn, the FWO may commence proceedings in relation to the contraventions admitted in the Enforceable Undertaking and seek penalties against the wrongdoer.
- 10.2. The Fair Work Ombudsman's acceptance of an Enforceable Undertaking, in no way impedes the ability of another party with standing to bring proceedings in relation to the contravention. For example, an employee affected by a contravention could apply under section 539(2) of the FW Act for orders in relation to the contravention. This means that pecuniary penalties may be imposed by a court on a wrongdoer even where the Fair Work Ombudsman has accepted an Enforceable Undertaking.
- 10.3. A Fair Work Inspector may continue investigations and, where appropriate, commence proceedings at any stage in relation to any matter that lies outside the scope of the Enforceable Undertaking.

## 11. Publishing and utilising enforcement activity

- 11.1. All parties affected by a contravention of a civil remedy provision will be informed of the Fair Work Ombudsman's acceptance of an Enforceable Undertaking and any subsequent variation or withdrawal.
- 11.2. Publishing the nature and outcome of enforcement activities (including Enforceable Undertakings) draws attention to the consequences of contravening Commonwealth workplace laws. It is a valuable tool both for educating workplace participants and deterring non-compliance.
- 11.3. Accordingly, the FWO may decide to publish (including on its website) and/or utilise information about its enforcement activities to leverage the outcome of inspection and enforcement activity, including Enforceable Undertakings.
- 11.4. For example, the FWO may:
  - (a) publish information about its enforcement activities to enhance specific and general deterrence;
  - (b) inform workplace participants in the same and similar industries of the nature and outcome of enforcement activities and provide advice in relation to how to prevent similar contraventions;
  - (c) utilise information from enforcement activities to inform future inspection activity particularly on a systemic level; and
  - (d) make all Enforceable Undertakings available for public inspection on the FWO's website.
- 11.5. Enforceable Undertakings will include an acknowledgment that the FWO may publish and utilise Enforceable Undertakings in this way. The Fair Work Ombudsman will not accept an Enforceable Undertaking that contains a clause requiring the Enforceable Undertaking to be kept confidential from any person.
- 11.6. However, the person giving the Enforceable Undertaking may request that certain information contained in the Enforceable Undertaking is not made publicly available. The FWO will consider such a request where the information is commercial in confidence; consists of personal details of an individual; or disclosure is otherwise contrary to the public interest.

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