Australian Government

Fair Work OMBUDSMAN

GN 5
FWO Industrial Action Policy

Guidance Note No.	5	**Guidance Note Title**	FWO Industrial Action Policy
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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 relation allegations and instances of industrial action. It is to be referred to as:

(a) Guidance Note 5; or

(b) the FWO Industrial Action Policy.

2.2. This Guidance Note is to be read in conjunction with Guidance Note 1 - FWO Litigation 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) About industrial action (paragraph 4);

(e) History and context of industrial action in Australia (paragraph 5);

(f) Protected and unprotected industrial action (paragraph 6);

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(g) Industrial action before the nominal expiry date of an enterprise agreement or workplace determination (paragraph 7);

(h) Payment during periods of industrial action (paragraph 8);

(i) Other contraventions that the Fair Work Ombudsman can enforce (paragraph 9);

(j) The role of Fair Work Australia (paragraph 10);

(k) The Fair Work Ombudsman's response to industrial action contraventions (paragraph 11);

(l) Enforcement action that may be taken by the Fair Work Ombudsman (paragraph 12);

(m) Factors relevant to 'public interest' in industrial action matters (paragraph 13).

2.4. The purpose of this Guidance Note is to provide the community with an understanding of the role of the FWO when industrial action occurs and the response that can be expected from the FWO in relation to allegations and instances of unprotected industrial action that contravenes a civil remedy provision of the FW Act (defined in this Guidance Note as unlawful industrial action).

2.5. This Guidance Note does not have the force of statute.

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 Fair Work Ombudsman:

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(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 the industrial action provisions under Part 3-3 of the FW Act.

4. About industrial action

4.1. Section 19 of the FW Act defines industrial action as:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work; or

(d) the lockout of employees from their employment by the employer of the employees.

4.2. Under the FW Act industrial action does not include:

(a) action by employees that is authorised or agreed to by the employer of the employees;

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(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action of the employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health and safety; and

(ii) the employee did not reasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

5. History and context of industrial action in Australia

5.1. The Australian *Conciliation and Arbitration Act* 1904 (**CA Act**) made industrial action unlawful in response to the great industrial disputes of the 1890s. In exchange, the CA Act recognised the 'role of collective organisations' in creating a unique workplace relations framework, based on conciliation and arbitration, designed to prevent industrial action. Notwithstanding the intention of the legislation, Australia, like its international counterparts, continued to experience industrial action. Those who engaged in industrial action were exposed to the potential for civil damages arising under contract and tort law.

5.2. The "right to strike" is not expressly sanctioned by any International Labour Organisation (**ILO**) convention. However, a necessary implication arises out of two ILO conventions, namely:

(a) the Freedom of Association and Protection of the Right to Organise Convention 1948 (Convention No 87); and

(b) the Right to Organise and Collective Bargaining Convention 1949 (Convention No 98).

5.3. Convention No. 87 entered into force generally on 4 July 1950 and Convention No. 98 entered into force generally on 18 July 1951. Neither entered into force for Australia until 28 February 1973.

5.4. Notwithstanding Australia's obligations under ILO Conventions 87 and 98 and ILO criticism of Australian law, it was not until the introduction of the *Industrial Relations Reform Act 1993* that a limited "right to strike" was enshrined in Australian law. The reforms were intended to give effect to Australia's international obligations. They introduced the concept of "protected action" within

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a bargaining period and provided protection from legal liability to those engaged in such action.

5.5. The *Workplace Relations Act* 1996 (**WR Act**) in part retained the 1993 protected action provisions. However, it introduced restrictions on industrial action during the life of a workplace agreement, on payment during strikes and on secondary boycotts.

5.6. The FW Act replaces the WR Act as the primary source of legislation governing Commonwealth workplace laws. The FW Act provides a balanced framework for cooperative and productive workplace relations that promotes economic prosperity and social inclusion for all Australians. With specific reference to industrial action, the object of the FW Act is to achieve productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action. The FW Act retains certain prohibitions on industrial action.

5.7. Protected industrial action under the FW Act is intended to be available only during the negotiation of an enterprise agreement (either before it is made or after its expiry). The good faith bargaining provisions in the FW Act and the powers given to Fair Work Australia (**FWA**) to facilitate bargaining indicate that industrial action should be a last resort, employed only after there has been a genuine attempt at reaching agreement in relation to permitted matters.

6. Protected and unprotected industrial action

6.1. Part 3-3 of the FW Act deals with industrial action by employees and employers. Division 2 of Part 3-3 of the FW Act, provides that industrial action is 'protected industrial action' only if:

(a) it is action taken by employees (or their bargaining representatives) to support or advance claims in relation to an enterprise agreement (**claim action**); or

(b) it is action taken by employers or employees in response to industrial action taken by the other party (**response action**); and

(c) the action meets the common and additional requirements for protection, which include:

- not taking action in relation to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement;

- not taking action before the nominal expiry date of an existing enterprise agreement or workplace determination;
- genuinely trying to reach agreement;
- observing the notice requirements;
- complying with any orders or declarations;
- not taking action in relation to a demarcation dispute;
- not taking action in relation to unlawful terms or as part of pattern bargaining (claim action only); and
- authorisation by ballot (claim action only).

6.2. Industrial action that is not protected industrial action is considered to be unprotected industrial action. However, not all unprotected industrial action contravenes a civil remedy provision under the FW Act.

6.3. Where unprotected industrial action contravenes a civil remedy provision under the FW Act, it can be investigated and enforced by the FWO. For the purposes of this Guidance Note, unprotected industrial action that contravenes a civil remedy provision under the FW Act is defined as unlawful industrial action.

7. Industrial action before the nominal expiry date of an enterprise agreement or workplace determination

7.1. Section 417 of the FW Act prohibits industrial action being taken prior to the nominal expiry date of an existing enterprise agreement or workplace determination. The Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 prohibits industrial action during the life of a transitional instrument, and extends the application of section 417 of the FW Act to agreement based transitional instruments on and after the repeal of the WR Act As such, any industrial action engaged in from the day an enterprise agreement, workplace determination or transitional instrument comes into effect until its nominal expiry date has passed, will be unlawful industrial action.

7.2. Contraventions of section 417 are investigated and enforced by the FWO.

8. Payment during periods of industrial action

8.1. Division 9 of Part 3-3 of the FW Act prohibits payment in relation to certain periods of industrial action.

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8.2. Under section 470 an employer is prohibited from making payment to an employee for the total duration that the employee engaged in protected industrial action. However, where the industrial action is taken in the form of a partial work ban the proportional payment rules under section 471 apply.

8.3. As a corollary to section 470, section 473 prohibits an employee or employee organisation from accepting or seeking a payment from an employer for the period of industrial action if that payment would contravene section 470 (Note: a contravention of section 473(2) may also contravene sections 348 and 349 which prohibit coercion and misrepresentations in relation to industrial activity).

8.4. Under section 474 an employer is prohibited from making payment to an employee who engages in unlawful industrial action for the total duration that the employee engaged in such action or for 4 hours, whichever the greater. The FWO recognises that, depending on the factual circumstances, section 474 can be a difficult to apply. Therefore, the FWO will, if invited to do so by the parties, express a view about the application of section 474 of the FW Act. The FWO's predecessor (the Workplace Ombudsman) litigated previous like section in the *Workplace Relations Act 1996*, section 507(2): *O'Shea v Heinemann* [2008] FCA 1799.

8.5. As a corollary to section 474, section 475 prohibits an employee or employee organisation from accepting or seeking a payment from an employer for the period of industrial action if that payment would contravene section 474.

8.6. The FWO investigates and enforces contraventions of the industrial action payment provisions (sections 470 - 475).

9. Other contraventions that the Fair Work Ombudsman can enforce

9.1. Other civil remedy provisions related to industrial action under the FW Act, for which FWO can take action, include:

- subsection 346(b) which prohibits a person from taking adverse action against another person because the other person engages, or has at any time engaged or proposed to engage, in industrial activity
- subsection 346(c) which prohibits a person from taking adverse action against another person because the other person does not engage, or has at any time not engaged or proposed to not engage, in industrial action
- section 421 which relates to persons contravening certain orders of FWA
- section 434 which relates to failing to comply with a ministerial direction in respect of industrial activity.
- subsection 458(2) which relates to reporting requirements for a protected

action ballot

- section 463 which provides that a person must comply with an order or direction of FWA in respect of a protected action ballot.

10. The role of Fair Work Australia

10.1. Section 418 of the FW Act provides that FWA must issue orders to stop or prevent action that is (or would be) unprotected industrial action. Further, under section 419 FWA must issue orders to stop or prevent industrial action taken (or proposed) by non-national system employers and employees where the industrial action will (or would be likely to) have the effect of causing substantial loss or damage to the business of a constitutional corporation. Interim orders may be made under section 420.

10.2. FWA can make such orders of its own volition or on the application of a person who is affected (whether directly or indirectly) by the industrial action, or an organisation of which the person is a member. Contraventions of an FWA order made under section 418, 419 or 420 are investigated and enforced by the FWO.

10.3. The FWA can also make an order to suspend (and in some instances terminate) protected industrial action where such action:

(a) is causing or is likely to cause imminent and significant economic harm to the employer or employees (section 423);

(b) threatens to endanger the life, personal safety or health or welfare of the population or part of it (section 424);

(c) threatens to cause significant damage to the Australian economy or an important part of it (section 424); or

(d) where FWA considers suspension is appropriate (section 425).

Contraventions of an FWA order made under section 423, 424 or 425 are not civil remedy provisions and ordinarily are not investigated and enforced by the FWO.

11. The Fair Work Ombudsman's response to industrial action contraventions

11.1. The FWO will enquire into all alleged instances of unlawful industrial action or other contraventions of civil remedy provisions under Part 3-3 that come to its attention. In this regard the FWO may act on its own volition, sourcing or receiving information from FWA, the Parliament, members of the public, workers, employers and all forms of media.

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11.2. The FWO takes allegations of unlawful industrial action and other contraventions of Part 3-3 seriously and treats these types of investigations as operational priorities. Investigations are conducted promptly, conscientiously, efficiently and effectively by Fair Work Inspectors (particularly those involving non compliance with an order of FWA).

11.3. Fair Work Inspectors use their statutory powers in the course of an investigation to determine whether the rights and obligations under Commonwealth workplace laws in relation to industrial action are met.

11.4. The FW Act empowers Fair Work Inspectors to enter workplaces and other premises for compliance purposes at any time during ordinary working hours or at any other time at which the Fair Work Inspector believes is reasonably necessary. While on the premises, the Fair Work Inspector may exercise one or more of the following powers:

(a) inspect any work, process or object;

(b) interview any person;

(c) require a person to tell the Fair Work Inspector who as custody of, or access to, a record or document;

(d) require a person having the custody of, or access to, a record or document to produce the record or document to the Fair Work Inspector either while the Fair Work Inspector is on the premises or within a specified period;

(e) inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer kept on the premises;

(f) take samples of any goods or substances in accordance with procedures prescribed by the regulations.

11.5. Fair Work Inspectors are also empowered (whether on premises or not) to

(a) require a person to tell the Fair Work Inspector the person's name and address if the Fair Work Inspector reasonably believes that the person has contravened a civil remedy provision;

(b) require a person to produce a record or document to the inspector.

11.6. Those parties involved in or impacted by unlawful industrial action may typically expect Fair Work Inspectors to conduct site visits as an operational priority, issue notices to produce documents, review records, conduct records of conversation

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and interviews with relevant witnesses and assess all material deemed relevant to the investigation.

11.7. Where unlawful industrial action or other contraventions of civil remedy provisions under Part 3-3 are brought to the FWO's attention, the community can expect that each investigation will be conducted to the stage of final determination (i.e. the FWO will make a finding about whether Commonwealth workplace laws have been contravened).

12. Enforcement action that may be taken by the Fair Work Ombudsman

12.1. Where an industrial action investigation discloses a contravention of a civil remedy provision (as contained in section 539 of the FW Act) there are a range of compliance tools that may be used by a Fair Work Inspector. These include:

(a) **Letters of caution** - Where the Fair Work Inspector is of the view the contravention is inadvertent or relatively minor, a letter of caution may be issued as an alternative to litigation.

(b) **Enforceable undertakings** - Where it is in the public interest, a written undertaking (in the form of a deed between the wrongdoer and the FWO as agent of the Commonwealth of Australia) may be accepted by the FWO in lieu of litigation.

(c) **Injunctions** – in particular, sections 417 and 421 of the FW Act provide that a Fair Work Inspector may make application to specified courts for an injunction or other order in relation to certain contraventions.

(d) **Litigation** – where there is sufficient evidence of the contravention and it is in the public interest to do so, FWO may commence litigation (refer to Guidance Note 1 - FWO Litigation Policy).

12.2. Individuals may be exposed to litigation if they contravene a civil remedy provision contained in section 539 of the FW Act. Examples include:

(a) an individual employee who wilfully breaches an FWA order;

(b) an individual office holder of an employee organisation or an individual employer if the person was involved in a contravention as outlined in section 550 of the FW Act; or

(c) an individual employer who wilfully fails to deduct wages in response to industrial action.

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12.3. Further individuals 'involved in' contraventions may be exposed to litigation under section 550 of the FW Act. The FWO's use of section 550 is discussed in Guidance Note 1 - FWO Litigation Policy. Section 550 has no less application in relation to unlawful industrial action. Accordingly, in each and every industrial action matter considered for litigation the FWO will look to determine if s.550 proceedings can also be commenced. In particular the FWO will have regard to the actions of advisers, professional activists, officials, and directors in their capacity where evidence supports the person has been involved in unlawful industrial action.

13. Factors relevant to 'public interest' in industrial action matters

13.1. The factors relevant to public interest are set out in Guidance Note 1 – FWO Litigation Policy. In industrial action matters the FWO considers the following factors to be of particular relevant to the test of public interest:

(a) the (potential) impact of the action, including impact on the financial circumstances of a company, third parties or the national economy. Generally, the greater the impact of the unlawful industrial action, the more likely the FWO is to commence litigation;

(b) the risk or suggestion of future unlawful industrial action and / or disturbance (generally defined) by any of the parties involved in or impacted by unlawful industrial action;

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing civil penalty litigation when there is evidence suggesting future unlawful industrial action is both probable and likely to cause further substantial loss or damage to a business or businesses, particularly those businesses involved in supply-chains where suppliers coordinate delivery of materials just before their use (just in time) in the manufacturing or supply process (e.g. air and road transport).

(c) whether there is a history of unlawful industrial action or contraventions by the relevant parties at the particular workplace (including any FWA orders under section 418);

(d) the level of destabilisation within the company and the relevant sector;

(e) whether the action is ongoing;

(f) the wilfulness or otherwise of any contravention;

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(g) the need to maintain the integrity of FWA orders;

(h) whether a letter of caution has been issued to or an undertaking accepted from the relevant parties;

(i) the return of ‘industrial harmony’ to a workplace following an act or instance of unprotected industrial action;

(j) any private arrangements or agreements between parties involved in, or impacted by unlawful industrial action; and

(k) the level of cooperation with the FWO investigation.

13.2. The FWO considers the following factors relevant to the test of public interest, but not determinative of it:

(a) the return of ‘industrial harmony’ to a workplace following an act or instance of unprotected industrial action;

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing civil penalty litigation when unlawful industrial action was organised or taken to advance a particular workplace grievance outside the relevant dispute resolution procedure and such a grievance was resolved but not before significant financial loss was sustained by one or more parties involved in or impacted by the industrial action. An example of this is where two hours of unlawful industrial action occurs resulting in a ship unable to leave its mooring at high tide, resulting in a delay of the ships departure and causing the incurring of additional fees and charges by the ships owners.

(b) any private arrangements or agreements (disclosed or non disclosed) between parties involved in, or impacted by unlawful industrial action;

(c) any suggestion, rumour or threats of future unlawful industrial action and / or disturbance (generally defined) by any of the parties involved in or impacted by unlawful industrial action;

(d) any suggestions or assertions (disclosed or non disclosed) the FWO is a hindrance to the workplace;

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing civil penalty litigation when any of the parties do not comply with lawful requirements made by a Fair Work Inspector.

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(e) where a Fair Work Inspector is deliberately hindered or obstructed in exercising powers;

For example, restricting a Fair Work Inspector's access to a premises on which the Fair Work Inspector has reasonable cause to believe unlawful industrial action has occurred.

(f) any assertion a breach of the Act is 'not a serious issue' and everything is 'back to normal'.

13.3. In taking investigative or enforcement action the FWO will not be influenced by:

(a) the attitude and response (whether welcoming or non welcoming) of the industrial participants towards the FWO investigation; and

(b) the attitude and response (whether passive or hostile) of the industrial participants towards the prospect of FWO commencing litigation against any party to the unlawful action.

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