

# Industrial relations regulation and compliance

## Office of Industrial Relations compliance and enforcement policy

The Queensland Government is committed to supporting fair, safe and productive Queensland workplaces. In this regard, Industrial Relations Regulation & Compliance ('IRRAC') within the Office of Industrial Relations, administers the *Industrial Relations Act 2016* and other workplace related legislation. Information and compliance services are provided state-wide.

This Enforcement Policy outlines the operational policy employed by IRRAC which involves case resolution procedures and the conduct of investigations and legal proceedings.

The appropriate use of a comprehensive range of strategies is designed to encourage greater compliance with industrial relations laws and enhanced awareness of the rights and obligations of employees, employers and other clients.

### Compliance strategies

The contemporary compliance and enforcement policy incorporates the following strategies:

- **dispute resolution** where parties are given opportunity to resolve the matter without the necessity for formal conference, investigation or litigation of cases. These involve claims of unpaid wages, primarily long service leave ('LSL') entitlements. Cases relating to industrial relations entitlements within local or state government may also be resolved in this stage;
- **wage recovery conference hearings** involving referral of cases to the Queensland Industrial Relations Commission ('QIRC') where appropriate;
- **formal investigation** of cases that remain unresolved following the dispute resolution procedures or following unsuccessful wage recovery conference hearing in the QIRC (where deemed appropriate);
- **investigation** of cases where complaints are made under other legislation administered including laws relating to child employment, private employment agents and trading hours; and
- **legal proceedings** comprising applications or prosecutions where appropriate. Alternatively, infringement notices may be issued in some cases.

In cases where it is deemed appropriate, assistance (e.g. provision of a wage assessment) may be offered to clients so that they may institute their own resolution action procedure before Queensland Civil & Administrative Tribunal ('QCAT') or another relevant tribunal.

Generally, the aim is to complete wage cases within 3 months. Cases requiring complex investigation and/or legal proceedings will usually take longer whereas less serious matters may be dealt with more quickly.

## **1. Dispute Resolution**

IRRAC initially attempts to resolve wage cases which, on prima facie information appear to have some substance and need resolution, by way of a dispute resolution procedure.

Dispute resolution gives the parties every opportunity to resolve the matter without the necessity for wage recovery conference, formal investigation or litigation action. Examples of dispute resolution procedures that may be utilised include:

- writing to the parties to inform them of their rights and obligations and encourage them to resolve the issues subject to complaint;
- telephoning the parties to provide information and clarify relevant issues to encourage them to resolve the issues subject to complaint;
- performing a desk based audit of time and wages records sent in by an employer to assess the merits and quantum of a complaint.

## **2. Wage Recovery Conference Hearings**

Cases that remain unresolved following dispute resolution procedures may be referred to the QIRC or may be subject to further investigation processes.

Referral to the QIRC may be by way of a wage conference hearing by a Commissioner with a view to resolution of the matter. An inspector will provide assistance to the Commission as necessary.

Consideration is given in the first instance to referring cases to the QIRC however; some cases may be deemed inappropriate for referral and will be subject to formal investigation and/or legal proceedings.

## **3. Formal investigation**

Inspectors undertake investigations into cases, including wage cases that remain unresolved following dispute resolution procedures or following a wage recovery conference hearing in the QIRC. The purpose of formal investigation is to formally examine relevant matters and determine the appropriate action. Formal investigation may involve:

- resolution of disputed facts;
- interpretation of industrial laws;
- establishment of employee rights or entitlements;
- a claim for the recovery of wages or other entitlements on behalf of employees;
- institution of infringement notice action and/or legal proceedings where appropriate; and
- institution of measures to attain future compliance with industrial laws.

### **3.1 Inspection**

Inspectors are appointed and authorised to carry out prescribed functions in the investigation of matters under the following statutes:

- *Industrial Relations Act 2016*;
- *Child Employment Act 2006*;
- *Private Employment Agents Act 2005*; and
- *Trading (Allowable Hours) Act 1990*.

Under the *Industrial Relations Act 2016*, an inspector has the power to enter workplaces, interview persons and inspect documents including time and wages records to ensure compliance with the Act.

With respect to wage cases, an inspector may:

- make a formal claim on an employer for the payment of arrears of wages that may be due to an employee; or
- recommend that legal proceedings be taken against an employer.

Similar powers exist in respect of the investigation of cases under the other Acts with the option of issuing an infringement notice for certain offences under the *Child Employment Act 2006*.

#### **4. Legal proceedings**

The institution of legal proceedings and the issuing of infringement notices assists in deterring non-compliance with industrial relations legislation.

Legal proceedings may be taken where an inspector has obtained sufficient evidence and, on balance, we consider it is in the public interest and a proper response to the conduct.

Before initiating legal proceedings the matter will be reviewed by a senior officer to ensure the matter meets the criteria outlined in the Litigation Policy (see paragraph 5 below).

Legal proceedings may include the following:

- prosecution proceedings in the Industrial Magistrates Court (for example, seeking a conviction and fine against an employer for the offence of failing to pay correct wages or another offence under the *Industrial Relations Act 2016*);
- an application to the QIRC for an order for the recovery of wages; or
- an application to the Industrial Magistrates Court (for example, seeking an order for the recovery of wages under the *Industrial Relations Act 2016*).

#### **4.1 Prosecutions**

Where a wage complaint remains unresolved following the wage resolution processes and subsequent investigation, during which the parties have been given every opportunity to resolve the matter, consideration is given in the first instance to taking prosecution action in the Industrial Magistrates Court to ensure compliance.

Other circumstances where prosecution action may be taken include:

- where an inspector alleges that a person has repeated the same offence;
- where an inspector alleges that a person has been advised of a requirement of the legislation but has failed to comply;
- where an inspector alleges that failure to keep and have relevant records available has jeopardised an employee's ability to recover entitlements; and
- alleged offences relating to inspectors' powers (for example, obstruction, false or misleading documents and information, etc).

Outcomes of successful prosecutions for offences may be published to draw attention to the consequence of industrial relations violations and the need for fairness in workplaces.

#### **4.2 Applications**

Applications to the Industrial Magistrates Court or the QIRC for a wages recovery order may be used where non-payment of wages has arisen from differing opinions over the interpretation of an industrial law or where disputed facts are in question.

The merits of such applications are decided on the balance of probabilities by the relevant tribunals and result in no convictions or penalties imposed on the employer in question.

The use of applications is not appropriate where wilful or repetitive behaviour is involved in the offence or where the employer has a poor industrial relations compliance history.

#### **4.3 Infringement Notices**

An infringement notice (sometimes called an "on-the-spot fine") may be issued for certain offences.

When an Inspector issues an infringement notice, it has an immediate punitive effect. Infringement notices are appropriate for use when the impact of the offence is high, or the offence adversely affects the inspector's ability to recover entitlements to which a person may be entitled. More serious offences involving wilful or repetitive behaviour, involving large sums of money or committed over a prolonged period of time may also warrant the issuing of an infringement notice.

A person issued with an infringement notice may elect to have the matter heard in the Industrial Magistrates Court.

#### **4.4 Appeals**

The purpose of appeals to a higher court is to ensure that legal proceedings are justly and correctly applied and that any penalty or order imposed is appropriate in the circumstances. The primary concern in a decision to appeal is whether the applicable law has been correctly stated and applied by the Industrial Magistrate or Commissioner.

Where it appears that the Industrial Magistrate or Commissioner has erred at law or the penalty imposed appears to be inadequate in the circumstances, IRRAC may consider an appeal against the decision. This action will only be taken when:

- advice from a legal officer presents a basis for the appeal; and
- there is a reasonable prospect that the appeal will be successful.

### **5. *Litigation Policy***

#### **5.1 The decision to prosecute**

Prosecution is a discretionary action. Not every breach of the laws passed by Parliament is automatically prosecuted. The dominant factor in the exercise of the discretion to prosecute or not to prosecute is the public interest.

IRRAC, by commencing a prosecution, aims to change the behaviour of the wrongdoer and deter future wrongdoers. Prosecution in appropriate circumstances sends a message to the community that failures of legislative responsibilities will be enforced through the Courts. The decision to prosecute is made on the basis of the applicable law at the time and public interest considerations.

#### **5.2 Factors taken into account**

The general public interest is the paramount concern to be taken into account in the decision to prosecute. As provided for in the Department of Justice and Attorney-General ODPP Director's Guidelines ('ODPP Guidelines'), the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:

- whether there is sufficient evidence (i.e. a prima facie case and reasonable prospects of a conviction); and
- whether the public interest require a prosecution.

#### **5.3 Sufficient Evidence**

A prima facie case is necessary but not enough. A prosecution should not proceed if there is no reasonable prospect of a conviction.

As noted by in the ODPP Guidelines, this consideration requires an exercise of judgment which will depend in part upon an evaluation of the quality and persuasive strength of the evidence as it is likely to be at trial.

#### **5.4 Public Interest Criteria**

In considering the public interest, the main criteria for consideration will be similar to that adopted by the ODPP Guidelines and include:

#### 5.4.1 Nature and circumstances of the alleged contravention

- a) the level of seriousness or triviality of the alleged offence, or whether or not it is of a technical nature only.

Generally and by way of example, IRRAC does not regard the following as “trivial”:

- (i) alleged offences giving rise to significant underpayments (upwards of \$5,000 in total (not per employee)) particularly where there is evidence that the employer knowingly contravened their obligations or did not properly discharge their duty to ascertain their obligations; and
- (ii) alleged offences giving rise to underpayments (including those less than \$5,000 in total), where special circumstances exist, e.g. vulnerable workers, numerous employees, or where the employer is a repeat offender (whether or not taken to court) or where there is evidence the employer knowingly contravened its obligations (e.g. deliberate exploitative behaviour).

Where an alleged offence is considered to be of a less serious nature, IRRAC will consider appropriate enforcement or dispute resolution mechanisms and alternatives to prosecution which may include warning letters, infringement notices or IRRAC assisted QCAT claims.

- b) The prevalence of the alleged offence and the need for deterrence, either personal or in general;  
c) The existence of any mitigating or aggravating circumstances;

Generally and by way of example, mitigating circumstances might include:

- (i) where there is no evidence of deliberate or reckless underpayment of employees, but rather a genuine misunderstanding (having made reasonable attempts to understand their legal obligations) and the employer readily rectified the underpayment.
- (ii) where the employer has sought advice, from IRRAC or a relevant professional, provided accurate information in seeking the advice and has relied on that advice; or
- (iii) where the employer has approached IRRAC and worked with IRRAC to rectify an underpayment and put in place systems to ensure that no contraventions will occur in the future.

Conversely, aggravating circumstance might include those where an underpayment is less than \$5,000 but the employer has failed to comply with an agreed payment plan or has refused, impeded or delayed attempts at voluntary compliance.

#### 5.4.2 Characteristics of the alleged wrongdoer

- a) the degree of culpability of the alleged wrongdoer in relation to the offence. This may include for example:
- (i) the degree or extent to which the alleged wrongdoer acted in accordance with any advice given by IRRAC or other authority in relation to compliance with the relevant legislation;
  - (ii) the relevant compliance history of the alleged wrongdoer; and
  - (iii) the attitude of the alleged wrongdoer (including any relevant proactive measures taken to comply with the relevant legislation).
- b) the youth, age, physical or mental health or special infirmity of the alleged wrongdoer or a necessary witness;
- c) whether or not the alleged wrongdoer is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged wrongdoer has done so; and
- d) the degree of culpability of the of the alleged wrongdoer in connection with alleged offence (for example the degree of management of senior management of the employer in the alleged offence).

#### 5.4.3 Impact of the alleged offence

- a) the attitude to the commencement of proceedings which is held by the person who was injured or otherwise affected by the alleged offence.

#### *5.4.4 Effect of litigation*

- a) the likely outcome in the event of a conviction considering the range of penalties available to the court; and
- b) the availability and efficacy of any alternatives to prosecution.

#### *5.4.5 Characteristics of the alleged aggrieved party*

- a) the degree to which the alleged aggrieved party has the available resourcing to commence legal proceedings on their own behalf.

#### *5.4.6 Level of public concern*

- a) whether or not the alleged offence is of minimal public concern.

#### *5.4.7 Deterrence*

- a) the prevalence of the alleged offence and the need for deterrence either specific or general.

#### *5.4.8 Administrative considerations*

- a) the necessity to maintain public confidence in the Parliament and the Courts;
- b) the likely length and expense of a Court hearing;
- c) whether or not the prosecution would be perceived as counterproductive to the interests of justice (e.g. by bringing the law into disrepute); and
- d) the staleness (length of time) since the alleged offence.

The applicability of and weight to be given to these and other factors will vary and depend on the particular circumstances of each case.

## **5.5 Impartiality**

IRRAC adopts the principle that a decision to prosecute or not to prosecute must be based upon the evidence, the law and these guidelines. It must never be influenced by:

- race, religion, sex, national origin or political views;
- personal feelings concerning the alleged wrongdoer or victim;
- possible political advantage or disadvantage to the government or any political group or party; or
- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

## **6. Determination of appropriate compliance strategy**

After consideration of all the relevant criteria (i.e. sufficient evidence and public interest), an investigation may result in:

- a) The commencement of a prosecution;
- b) The commencement of a civil application in the QIRC or Industrial Magistrates Court;
- c) The issuing of an infringement notice;
- d) The issuing of a letter of caution;
- e) The commencement of a Wage Recovery Conference in the QIRC;
- f) a referral to institute a self-resolution procedure before QCAT or another relevant tribunal; or
- g) no further action.

The resources available to IRRAC to institute legal proceedings are finite. They will therefore not be expended in pursuing inappropriate cases.

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