Private Sector Labour Relations Division Compliance and Enforcement Policy

The Private Sector Labour Relations Division (Labour Relations) of the Department of Mines, Industry Regulation and Safety (the Department) has a number of functions, including the provision of advisory, education and compliance services for State employment laws.

1. Introduction

This Compliance and Enforcement Policy (the Policy) sets out the principles adopted by Labour Relations to secure compliance with the following State employment laws:

- *Industrial Relations Act 1979* and instruments made under the Act such as State awards;
- *Minimum Conditions of Employment Act 1993*;
- *Long Service Leave Act 1958*; and
- Part 7 of the *Children and Community Services Act 2004* dealing with the employment of children in Western Australia.

The primary objectives of the Policy are to:

- ensure that employees are paid their correct entitlements under State employment laws;
- ensure that children under 15 years of age are only engaged to perform work in accordance with Part 7 of the *Children and Community Services Act 2004*;
- promote a level playing field for Western Australian businesses, so that businesses underpaying employees do not gain a competitive advantage over businesses doing the right thing;
- foster confidence in the community that State employment laws are taken seriously and are enforced fairly and consistently by Labour Relations.

2. Labour Relations' jurisdiction

Two industrial relations systems operate in Western Australia – the State system and the national system.

Labour Relations oversees compliance in the State system. In the national system, compliance is overseen by various bodies including the Fair Work Ombudsman and the Australian Building and Construction Commission.

The *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* generally only apply to:

- unincorporated employers – such as sole traders and businesses run by unincorporated trustees;
- incorporated employers that do not have significant trading or financial activities – such as some not-for-profit associations and local government authorities; and
- Western Australian public sector employers.

The *Long Service Leave Act 1958* applies to most private sector employers and employees in Western Australia, including the majority of those covered by the national system.

Part 7 of the *Children and Community Services Act 2004* dealing with the employment of children applies to all employers and employees in Western Australia, including those covered by the national system. Labour Relations enforces Part 7 of the Act pursuant to a Memorandum of Understanding with the Department of Communities.

Further information on who is covered by the State industrial relations system can be found at: www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system

3. Ways of achieving compliance

There are various ways that Labour Relations seeks to achieve compliance.

One informal but important way is advising employers and employees of their rights and obligations under State employment laws. Labour Relations does this through its Wageline service, online education materials, seminars and media releases.

Where a formal complaint is made to Labour Relations by an employee that they have not received their correct entitlements, Labour Relations will generally conciliate between the employee and their employer (see Section 6 of the Policy). Most complaints are resolved this way. Conciliation is a quick, efficient and cost effective way of achieving voluntary compliance with State employment laws.

4. Advice, support and assistance

Assisting employers and employees to understand their respective rights and obligations is the optimal way of achieving compliance. A key objective of Labour Relations is to empower the parties to self-regulate through the provision of readily accessible information.

Private sector employers and employees can speak with a Wageline adviser on 1300 655 266. Wageline also responds to email queries at wageline@dmirs.wa.gov.au.

The Department's website provides information and tools for employers and employees including WA award summaries, leave calculation guides and detail on minimum pay rates, when children can work and record-keeping requirements. The Wageline Newsletter email service for employers provides regular updates on critical employment issues, including changes in pay rates.

5. Industrial inspectors

Labour Relations has a number of officers designated as industrial inspectors under the *Industrial Relations Act 1979*. Industrial inspectors may investigate alleged breaches of State employment laws, as well as take enforcement action in the Industrial Magistrates Court.

The primary role of industrial inspectors is set out in section 98(2) of the *Industrial Relations Act 1979* and a directive issued by the Minister for Commerce and Industrial Relations.

The powers of industrial inspectors are set out in the various State employment laws, including:

- section 98 of the *Industrial Relations Act 1979*;
- sections 12 and 26A of the *Long Service Leave Act 1958*; and
- sections 195 and 196 of the *Children and Community Services Act 2004*.

Industrial inspectors do not represent employers or employees. They act impartially and fairly to achieve compliance with State employment laws. Industrial inspectors are bound by the Department's Code of Conduct in the performance of their duties, as well as the Public Sector Commissioner's Code of Ethics.

6. Conciliation

If an employee makes a formal complaint to Labour Relations that they have not been paid their correct entitlements, the complaint will generally be referred to conciliation.

An experienced industrial inspector will attempt to conciliate between the employee and their employer. The parties are encouraged to try and resolve the complaint between themselves, with appropriate assistance from the industrial inspector. The conciliation period is generally up to 21 days.

Most complaints received by Labour Relations are resolved quickly and satisfactorily through conciliation. However, where complaints cannot be resolved they may be referred to a formal investigation.

It should be noted that complaints under Part 7 of the *Children and Community Services Act 2004* are referred straight to a formal investigation. These complaints concern the welfare of children and are not considered appropriate for conciliation.

7. Formal investigations

Labour Relations may formally investigate a complaint if it meets certain public interest guidelines. A formal investigation involves an industrial inspector gathering evidence to determine whether there has been a breach of a State employment law.

As part of a formal investigation, an industrial inspector will generally:

- require the employer to produce relevant employment records and other documents (such as tax documents and bank/financial records);
- interview and take a statement from the employee;
- interview and take a statement from any relevant third party (such as co-workers of the employee or clients of the business);
- provide the employer with the opportunity to respond to the allegations;
- assess the evidence and determine whether there has been a breach;
- provide the employer with the opportunity to voluntarily rectify any identified breach.

Depending on the circumstances of the case, a formal investigation may take up to 12 months to complete.

If an employer does not rectify an identified breach after a formal investigation, Labour Relations may:

- issue the employer with an administrative warning, referred to as a "Compliance Undertaking"; and/or
- commence court action against the employer (see Section 9 of the Policy).

Labour Relations does not formally investigate every complaint that it receives, and exercises discretion in deciding which matters to investigate. Labour Relations has developed guidelines to assist determining whether a complaint will be formally investigated. These guidelines are set out in **Attachment A** to this Policy.

Even if a complaint meets the guidelines, Labour Relations may decide not to investigate, or continue with an investigation, because of some countervailing reason. For example, it may not be in the public interest to:

- investigate a complaint where there is evidence that the employee has stolen from their employer or engaged in unlawful conduct at work;
- continue with an investigation where the quantum of the underpayment is small.

Labour Relations must direct its resources in the most efficient and effective way possible to achieve compliance with State employment laws. Formally investigating every complaint made does not necessarily achieve this objective.

8. Proactive compliance campaigns and audits

Labour Relations undertakes targeted proactive compliance campaigns and audits. Proactive compliance is often intelligence-led and risk-based. For example, if Labour Relations receives a large number of complaints about a particular industry, this may be an indicator of wider spread problems in that industry.

Proactive campaigns are also used by Labour Relations to raise awareness of employers' obligations under State employment laws.

Examples of proactive campaigns include:

- an audit of employers in the fast food industry to check compliance with Part 7 of the *Children and Community Services Act 2004*;
- an audit of employers who have previously been found by Labour Relations to be in breach of their employment obligations (for example, because they failed to pay the correct entitlements and/or keep the required employment records);
- a time and wages audit of cafes and restaurants in regional south west;
- a time and wages audit of fruit and vegetable growers in regional north west.

Proactive campaigns are undertaken by industrial inspectors utilising their powers under State employment laws. As part of a proactive campaign, inspectors may enter the workplace, inspect records, speak to any person and compel answers. While these compulsory powers are not used often, they are an important compliance tool and will be used as required.

Employers that are found to be in breach of their employment obligations in a proactive compliance campaign will generally be given the opportunity to voluntarily rectify the breach. However, there will be instances in which it is appropriate for Labour Relations to commence court action.

Labour Relations will work with employers to assist them to comply with State employment laws. For example, Labour Relations partnered with a national franchisor after finding one of its franchisees had breached Part 7 of the *Children and Community Services Act 2004*. The franchisor undertook a voluntary audit of all its Western Australian stores to check compliance with the Act. It also updated its website, job application forms and information/training materials for franchisees to include information on the Act.

Labour Relations may undertake proactive compliance campaigns in conjunction with other relevant government agencies including the Fair Work Ombudsman, Australian Border Force and the Department of Communities.

9. Court action

Labour Relations may decide to take action in the Industrial Magistrates Court to enforce a State employment law. Court action is generally taken in the civil jurisdiction of the Industrial Magistrates Court. However, court action under Part 7 of the *Children and Community Services Act 2004* is taken in the prosecution jurisdiction of the Court.

The remedy that Labour Relations is able to seek will depend on the particular State employment law being enforced. In general terms, the remedy may be an order(s) that the employer:

- pay the employee any monetary entitlements owing to them, plus interest;
- pay a civil penalty or fine for breaching the employment law;
- do, or refrain from doing, a certain thing (for example, an order requiring the employer to provide the industrial inspector with employment records);
- pay Labour Relations' disbursements in bringing the court action;
- pay costs for Labour Relations' legal representation in certain circumstances (namely where the employer's defence is frivolous or vexatious).

Labour Relations exercises discretion in deciding whether to commence court action against an employer. Court action may be taken where:

- there is sufficient evidence (referred to as a "prima facie case"); and
- it is in the public interest to take the action.

In deciding whether to take court action, Labour Relations broadly applies the Director of Public Prosecutions "Statement of Prosecution Policy and Guidelines 2018". While this Statement relates to criminal proceedings, it still has relevance to the commencement of civil proceedings where pecuniary penalties may apply.

Prima facie case

Court action will only proceed where there is a prima facie case against the employer alleged to have breached the State employment law.

In assessing whether a prima facie case exists, consideration is given to:

- the likely admissibility of evidence;
- the reliability and credibility of witnesses; and
- any defences open to the employer.

In the event that a prima facie case exists, consideration is given to the prospects of success.

Public interest

Even if a prima facie case exists and there are reasonable prospects of success, court action will only be taken if in the public interest.

Public interest factors supporting court action include:

- maintaining public confidence in State agencies;
- giving effect to the objects of the relevant State employment law;
- ensuring that the relevant State employment law is properly administered and enforced;
- taking appropriate action that reflects the seriousness of the alleged breach;
- protecting employees from exploitation;
- prevent skewing of markets where some employers unlawfully undercut their competitors and profit from their wrongdoing;
- providing a specific deterrent to the employer who has breached the relevant State employment law;
- providing a general deterrent to other employers who might consider breaching a State employment law;
- obtaining precedent on a particular point of law.

Public interest factors weighing against court action include:

- the trivial or technical nature of the alleged breach in the circumstances;
- the poor state of health, disability or age of the employee or employer in question;
- the perception that taking court action is counterproductive to the interests of justice;
- the resources necessary to take court action are too expensive and too time consuming in circumstances where other enforcement methods can be used;
- other enforcement methods are just as effective, or more effective, than taking court action;
- the alleged breach is likely to be an isolated occurrence;
- the unavailability of witnesses or their unwillingness to cooperate;
- concerns about the employee's conduct or credibility.

In the event that Labour Relations takes successful court action, it will usually issue a media statement with the case details and publish the statement on the Department's website.

If Labour Relations decides not to take court action against an employer, the employee has the option of taking their own action. In this case, Labour Relations can:

- provide the employee with information on how to take their own court action; and
- if the employee is considered by Labour Relations to be vulnerable, help them fill out the initial application form to commence proceedings in the Industrial Magistrates Court.

It is important to remember that Labour Relations does not represent individual employees, and that taking court proceedings involves significant time and public resources. However, court action is the ultimate tool of enforcement available to Labour Relations and will be utilised where appropriate and necessary.

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Department of **Mines, Industry Regulation and Safety**

Private Sector Labour Relations:

1300 655 266

Contact Wageline
Within Western Australia: 1300 655 266
Outside Western Australia: 08 6251 2100
Website: www.dmirs.wa.gov.au
Email: wageline@dmirs.wa.gov.au

Mailing address
Locked Bag 14
Cloisters Square WA 6850

National Relay Service: 13 36 77
Quality of service feedback line: 1800 304 059
Translating and Interpreting Service (TIS) 13 14 50
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Guidelines for Labour Relations commencing a formal investigation - Attachment A

Factors supporting a formal investigation	Examples
Children and Community Services Act 2004	
An allegation relating to a breach of Part 7 of the *Children and Community Services Act 2004* will usually be investigated (concerning the employment of children under 15 years)	• A child under 13 years is performing work that is not delivery work • A child who is 13 or 14 years is working in a business that is not a shop, retail outlet or restaurant • A child who is 13 or 14 years is working in a shop, retail outlet or restaurant before 6am or after 10pm
Vulnerability of employee	
Employee is vulnerable because of: • age • ethnic background • visa status • health • some other demonstrated reason	• Employee is a child (under 18 years) • Employee does not speak English or have English as their first language • Employee is on a temporary visa • Employee has a mental or physical impairment • Employee was threatened by their employer
Training contract	
Employee is on a training contract registered under the *Vocational Education and Training Act 1996* (WA)	• Apprentice • Trainee • Cadet • Intern
Employee has received no pay or inadequate pay	
These factors may be indicative of exploitation	• Workers undertaking unpaid "trial work" or "work experience" (not being part of a vocational program) • Backpackers performing unpaid regional work to qualify for a second-year visa • Employees performing work in exchange for meals and/or accommodation
Employer has had past compliance issues	
Employer has had past compliance issues with Labour Relations	• Employer has had a previous complaint made against them • Employer has been previously investigated by Labour Relations • Employer has received a "Compliance Undertaking" from Labour Relations • Employer has received information from Labour Relations as part of a proactive compliance campaign
Seriousness of alleged breach	
The nature of the alleged breach appears to be serious	• Quantum of the alleged underpayment is substantial • Employer's conduct extends over a long period of time and affects multiple employees • Employer's conduct appears to be part of a "business model" of underpaying employees • Employer has failed to keep the required employment records • Employer has engaged workers who are not entitled to work in Australia or who are in breach of their visa conditions • Employer has required an employee to pay back all or part of their wages • Employer has made regular unauthorised deductions from an employee's pay
Employer has obstructed an industrial inspector	
It is unlawful to obstruct or wilfully mislead an industrial inspector in the performance of their duties	• Employer has failed to produce records to an industrial inspector when required to do so • Employer has provided an industrial inspector with falsified records • Employer has prevented an industrial inspector from entering the workplace or remaining at the workplace