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Employment Law e-alert

Compliance and the Fair Work Ombudsman

The Fair Work Ombudsman continues the work of the Workplace Ombudsman in promoting and monitoring compliance with Commonwealth Workplace Laws.

The inspection power is the primary compliance tool and it is being utilised widely and often. Fair work inspectors, appointed by the Ombudsman, investigate and enforce compliance with applicable awards. Employers will receive letters advising of these inspections, many of which are randomly conducted.

This is the cornerstone of a policy which attempts to achieve compliance by encouraging voluntary rectification of breaches where possible.

This process of compliance audits is additional to the established investigative role. The system continues to encourage the making of individual complaints which can trigger an investigation which can culminate in prosecution.

If an investigation - whether initiated by complaint or as part of an audit - reveals a contravention an inspector may take a number of alternative steps including,

- the commencement of litigation,
- the issuing of a compliance notice,
- the issuing of a letter of caution,
- the securing of an enforceable undertaking from the wrongdoer,
- the referral of the matter to small claims procedures [or some other dispute resolution] mechanism
- or take no further action.

In determining whether proceedings should be commenced the relevant considerations will include the nature and circumstances of the alleged contravention, public interest matters such as the level of public concern and deterrence, the impact of the contravention, characteristics of the alleged wrongdoer and administrative considerations.

As an alternative to prosecution the Fair Work Ombudsman may also secure compliance through a more informal "breach bargaining" procedure which involves negotiations between the parties and the Ombudsman's office to remedy a non-compliance.

Ignorance or misunderstanding of minimum pay requirements is of no assistance to employers in avoiding a prosecution. The Fair Work Ombudsman's focus on educating employers and publication of policy statements means that the scope for mitigating the seriousness of any non compliance and reduction of penalties on

the basis of ignorance of the se obligations is non existent. It is worth bearing in mind that penalties of up to \$33,000 may be imposed on companies and \$6000 on individuals, for each breach [as well as making good the shortfall in payments to the employee].

It can be expected that in those cases where a prosecution ensues that the Fair Work Ombudsman will continue the policy of promulgating widely the fact of the prosecution, and the amount of any penalties imposed. There can be no doubt that this policy is effective in exposing the risks of non compliance which should encourage all employers to make enquiry with respect to the nature and extent of their obligations and to conduct their own audit of their compliance with them. This is a process we will be pleased to assist you with.

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