



## **Purpose**

Industrial relations laws in NSW give NSW Industrial Relations (NSW IR) inspectors the power to undertake workplace investigations and compliance activities, including prosecutions, against employers. NSW IR undertakes compliance activities to achieve three policy goals, which are:

1. to secure long-term compliance with NSW industrial relations laws by employers and employees;
2. to penalise significant non-complying behaviour that has been identified by NSW IR inspectors; and
3. where practicable, to require an employer to rectify identified breaches of NSW laws.

NSW IR's compliance activities are supported by its information, advisory and education services. These services are also primarily provided to employers and employees to secure long-term compliance with NSW industrial relations laws.

This policy recognises that the overall effect of undertaking a compliance program is to demonstrate that the regulator does not sanction non-complying behaviour. This creates both a deterrent to non-complying behaviour, and provides assurance to those employers and employees who are complying with the law that non-complying behaviour will be penalised.

## **Using this Policy**

The NSW IR 'Prosecutions Policy' is a document published on the NSW IR website. It guides NSW IR staff who are undertaking investigations and prosecuting breaches of NSW industrial relations laws.

## **Compliance Sanctions available to NSW IR**

Under NSW industrial relations laws, NSW IR inspectors are provided with four types of compliance sanctions to apply against identified non-complying behaviour.

These are formal caution, administrative penalty (for offences prescribed as penalty notice offences by the *Industrial Relations (General) (Regulation 2001)*) and criminal and other prosecution. An inspector may recommend that an employer be prosecuted for any prescribed criminal offence or other breach of NSW industrial laws. This recommendation must be endorsed by the NSW IR Prosecutions Panel and approved by the Executive Director, NSW IR.

## **The Decision to Prosecute**

The decision to prosecute recognises that resources should be committed to pursuing matters which advance NSW IR objectives. Available resources should be concentrated on those cases worth litigating.

It is only after considering the circumstances of a particular case and reviewing the relevant public interest factors and the overriding objects of industrial legislation, that the decision to prosecute is made.

This is not to be taken to suggest that NSW IR will only proceed where it is certain the action will be successful. The final result cannot be known in advance. The decision to prosecute is made when NSW IR determines, in the circumstances of the case, that court action is appropriate.

Although investigation of a matter might disclose an offence, there remains a variety of factors to be considered before making the decision to prosecute. The probability of success, previous outcomes, the likely penalty (including fine, forfeiture, compensation and cost components), and the attitude of the courts in similar matters, are all factors which must be viewed in the light of current compliance programs.

A NSW IR inspector will determine which compliance sanctions may be applied against an identified breach of NSW industrial relations laws.

The decision to institute any compliance sanction must be made in order to achieve the policy goals identified by the Executive Director from time to time, having regard to the information obtained during the course of the investigation about the breach and the employer. This is necessary for integration of broad policy objectives identified by Policy in conjunction with the Executive Director.

## **Penalty Framework**

The appropriate penalty to be sought will be a matter to be determined by the Executive Director based on recommendations made by the Prosecutions Panel.

## **Prosecutions Panel**

The role of the Prosecutions Panel is to:

- endorse or refuse to endorse investigations submitted for prosecution;
- give ongoing direction and assistance to Industrial Relations Compliance Branch management via advice to the Principal Investigator and inspectors, to supplement case management activities;
- manage the consistent application of this policy and, through this, the consistent application of compliance enforcement and prosecution activities in 'State' matters;
- ensure that NSW IR's compliance activities meet the commitments established in the NSW IR Business Plan and Treasury's strategic plan;
- review any investigation withdrawn from prosecution; and
- make recommendations to the Executive Director, concerning the direction of prosecution and related legal policy development in NSW IR.

The chair of the Prosecutions Panel is the Director, Compliance. The Panel will meet on an as required basis. Every decision of the Panel must be documented on the relevant investigation file and in a centralised register held by the Director, Compliance.

## **Public Interest Guidelines and other Criteria**

The Prosecutions Panel will determine whether each proposed prosecution is in the 'public interest' and can be undertaken, following recommendations from the Director, Compliance, with recommendations endorsed being forwarded to the Executive Director for final decision as to whether proceedings are to be undertaken.

It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution (e.g. a formal caution) should always be considered.

A decision whether or not to proceed must not be influenced by:

- (i) The race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
- (ii) personal feelings of the prosecutor concerning the offence, the alleged offender or a victim;
- (iii) possible political advantage or disadvantage to the government or any political party, group or individual;
- (iv) possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct; or

- (v) possible media or community reaction to the decision.

Although there may be admissible evidence capable of establishing each element of the offence and a reasonable prospect of conviction by the Court, discretionary factors may nevertheless indicate that it is not in the public interest for the matter to proceed.

Factors which may be considered in determining whether the public interest requires a prosecution include, but are not limited to, the following:

- (a) the seriousness or relatively trivial nature of the offence or that it is of a 'technical' nature only;
- (b) mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
- (c) the physical or mental attributes of the alleged offender, if the offender is a natural person (e.g. a person may have an impairment which may make the prosecution 'oppressive' to that person), especially having regard to the seriousness of the offence;
- (d) the alleged offender's prior record in the industrial jurisdiction in NSW or any other part of the Commonwealth of Australia;
- (e) the passage of time since the alleged offence occurred, the circumstances at the time and when the offence was discovered;
- (f) the degree of culpability of the alleged offender;
- (g) the effect on community harmony and public confidence in the administration of justice;
- (h) the obsolescence, obscurity or impracticality of enforcing the law having regard to the 'mischief' the law seeks to remedy;
- (i) whether the prosecution would be perceived as counter-productive by bringing the law or its enforcement into disrepute;
- (j) the availability of alternatives to prosecution, such as formal cautioning or enforcement undertakings;
- (k) the prevalence of the alleged offence and the need for specific and general deterrence;
- (l) whether the consequences of conviction might be unduly harsh or oppressive (i.e. they would lead to a substantial further loss greater than the costs of defending a prosecution – for example, where licenses to operate a business or undertake an occupation are at stake), such that the real penalty may not be commensurate with the actual offence committed, but amount to a further additional penalty;
- (m) whether the alleged offence is of a considerable public concern; and
- (n) the likely length and expense of a trial, both to the defendant and the State of NSW.

The applicability and relative weight of these and other relevant factors must be weighed in the particular circumstances of each case.