

Managing Complaints of Non-Compliance in NSW

Policy Statement and Objective

Industrial Relations (IR) Compliance delivers a variety of frontline advice and information services directly to citizens with respect to statutory industrial entitlements and the administration of key components of the current industrial framework in NSW. For the purposes of this policy reference to a citizen means any person whose employment conditions are established and administered within the NSW industrial relations jurisdiction.

Investigators provide advice to both employers/bailors/agents and employees/bailees/performers with respect to industrial entitlements; investigate complaints and undertake targeted industry compliance and enforcement activities. These services enable and support relevant NSW businesses to secure long-term compliance with NSW industrial relations laws.

Citizens can seek the assistance of IR Compliance in investigating workplace complaints relating to alleged breaches of NSW industrial legislation including:

- *Long Service Leave Act 1955*
- *Entertainment Industry Act 2013*
- *Retail Trading Act 2008*
- Taxi Industry (Contract Drivers) Contract Determination 1984
- NSW Transport Industry Contract Determination
- Industrial instruments for Local Government employees

Section 385 of the *Industrial Relations Act 1996* provides NSW Industrial Relations Inspectors the authority to undertake workplace investigations and compliance activities, including prosecuting breaches of NSW Industrial Relations (IR) laws. IR undertakes a range of compliance activities to:

- secure long-term compliance with NSW IR laws by employers/bailors/agents and employees/bailees/performers;
- penalise, where necessary, significant identified non-compliant behaviour;
- require an employer/bailor/agent to rectify identified breaches of NSW IR laws, where practicable.

Both the individual lodging a complaint of non-compliance and the employer/bailor/agent identified in the complaint can expect to have the matters raised by the complainant handled in a professional and timely manner. This policy sets out the steps involved in assessing, managing and resolving the complaint and the associated timeframes.

When IR Compliance acts on a complaint, it will impartially investigate to identify potential breaches of NSW IR laws. IR Compliance does not represent, or act on behalf of, either party in an investigation.

IR Compliance ensures that in managing complaints, the best possible standard of service is provided. Standards are consistent with the NSW Ombudsman Guidelines for effective customer complaint handling and Australian Standard AS ISO 10002-2006.

Scope

This policy

- establishes a clear framework for the assessment, investigation and management of industrial complaints regarding the non-payment of entitlements, from citizens, including defining clear timeframes and accountabilities for the compliance activities associated with the complaint.
- ensures that IR Compliance handles all industrial complaints in a professional and respectful manner, ensuring the complaint is progressed in an efficient and timely way and actions and decisions are communicated clearly to the parties.
- provides both parties with confidence in the complaint handling process and clear expectations regarding the handling of the complaint, the steps involved in managing the complaint and the possible outcomes of the complaint.
- applies to all Industrial Inspectors (Investigators) within IR Compliance, who are required to follow the steps in this policy when handling any complaint. All timeframes are, as far as possible, to be adhered to unless exceptional circumstances prevent the Investigator from doing so. Investigators are required to document all delays experienced in managing the complaint.

Summary

Item	Topic	Key points
1	Assessment Criteria for Industrial Complaints	Clear assessment criteria will be used to assess complaints from NSW citizens and determine the steps to be taken to address/resolve the complaint.
2	Lodging a Complaint	IR Compliance offers a variety of accessible ways in which a complaint can be lodged including online, email or post.
3	Complaint Handling Stages	IR Compliance applies a three-stage triage process for the handling of all complaints including preliminary assessment, pre-investigation and investigation.
4	Compliance Sanctions	IR Compliance Investigators are able impose compliance sanctions against identified non-complying behaviour, including Formal Caution, General Penalty Notice and Notice to Employer and can also recommend prosecution action where appropriate.
5	The Decision to Prosecute	The decision to prosecute recognises that resources should be committed to pursuing matters which advance IR Compliance objectives. Available resources will be concentrated on those cases worth litigating, having regard to the public interest.
6	Review of Decisions	On completion of the complaint, the parties will be afforded an opportunity to seek a review into the handling of the matter.
7	More Information	A range of additional information is provided to assist citizens in the handling of their complaint.

1 Assessment criteria for accepting industrial complaints

Unless otherwise provided, citizens wishing to make a complaint regarding alleged breaches of industrial legislation must submit their complaint within 12 months of the relevant period of engagement. Adherence to this timeframe provides IR Compliance with the opportunity to gather necessary contemporaneous employment records and other evidence regarding the complaint. The ability of IR Compliance to gather relevant evidence is limited where the relevant employment period ceased more than 12 months ago. A complaint will be accepted by IR Compliance in the following circumstances:

1.1 The complaint concerns:

- (i) breaches of the *Long Service Leave Act 1955*;
- (ii) non-payment of statutory entitlements to a bailee or contract driver;
- (iii) non-payment of award/statutory entitlements and/or illegal deduction from pay of a Local Government employee;
- (iv) non-payment of fees or a deduction in excess of the capped fee to a performer for services under an Entertainment Industry Agreement or an Entertainment Industry Managerial Agreement; or
- (v) breaches of the restricted trading days under *Retail Trading Act 2008*.

1.2 The complainant:

- (i) is currently employed by the employer nominated in the complaint or has been employed within the 12 months immediately preceding lodgement of the complaint;
- (ii) is a performer within the meaning of the *Entertainment Industry Act 2013*;
- (iii) has an entitlement to long service leave relating to employment in the 12 months immediately preceding lodgement of the complaint;
- (iv) is a current contract driver under a Contract Determination or has been such a contract driver within the 12 months immediately preceding lodgement of the complaint;
- (v) is currently a bailee under the Taxi Industry (Contract Drivers) Contract Determination 1984 or has been such a bailee within the 12 months immediately preceding lodgement of the complaint; or
- (vi) is a member of the public who believes there has been a breach of the *Retail Trading Act 2008*.

1.3 Notwithstanding the conditions outlined in 1.2 above, IR Compliance may exercise discretion in accepting complaints lodged outside the required timeframe where evidence is available to demonstrate the complainant would face significant difficulties in pursuing alternative remedies to resolve their complaint.

2 Lodging a complaint

Complaints of non-compliance may be lodged using the [online complaint form](#) or by printing the form and posting to GPO Box 5469, Sydney NSW 2001. All complaints will be acknowledged within 5 days of receipt. Acknowledgement will be accompanied by advice that the matter will be allocated for investigation or a request for the complainant to provide further information. Complainants will be provided with the contact details of the Investigator handling their complaint.

3 Complaint handling stages

All complaints are triaged through the following stages:

- (i) **Preliminary Assessment:** Provision of assistance to the complainant to establish the correct jurisdiction of any claim(s) and quantify any entitlements alleged to be owing.
- (ii) **Pre-investigation:** Assisting the employer and employee to resolve any disputed entitlements by advising legislative obligations.
- (iii) **Investigation:** Formally investigating the complaint where the matter remains unresolved after 21 days.

The consistent application of this triage process ensures a transparent regulatory environment. Complainants can expect to be provided with information at each stage of the triage process regarding the progress of their complaint and reasons for any decision to discontinue the matter.

The following table sets out the complaint handling stages in detail, including what happens at each stage, how long each stage is expected to take and what the next steps are.

Complaint Handling Stages

1. Preliminary Assessment

What happens to the complaint	How long does it take	What are the next steps
<p>IR Compliance undertakes a <i>Preliminary Assessment</i> of the complaint to determine whether:</p> <ul style="list-style-type: none"> there is a jurisdictional basis upon which IR Compliance can proceed; relevant timeframes are satisfied. <p>The complainant is advised of the outcome of IR Compliance's assessment, or whether additional information is required for the assessment.</p>	<ul style="list-style-type: none"> For routine and non-complex complaints, the preliminary assessment will be concluded within 5 working days from the date of receipt of the complaint. Where the complainant is requested to provide further information, this information is to be provided within 5 working days from the date of the request. Preliminary Assessment will be concluded within 5 working days following receipt of the additional information requested. 	<ul style="list-style-type: none"> Complaints satisfying the assessment criteria will be allocated for Pre-Investigation. Complaints which do not meet the jurisdictional requirements of IR Compliance will be concluded with advice being provided to the complainant setting out reasons for the decision. Complainants will be provided with advice regarding other alternative avenues to pursue the matter.

2. Pre-Investigation

What happens to the complaint	How long does it take	What are the next steps
<p>IR Compliance will encourage the parties to resolve the matter (privately or with IR Compliance assistance) in a timely manner.</p> <p>Where necessary, IR Compliance will provide information to the employer to clarify jurisdictional issues and legislative obligations.</p> <p>The Investigator will:</p> <ul style="list-style-type: none"> within the first 7 days of Pre-Investigation contact the employer and the employee (the complainant) to ascertain the status of discussions. Ensure all contact with the parties is accurately recorded within required systems. 	<ul style="list-style-type: none"> IR Compliance will allow 14 days for the parties to resolve the complaint. If it can be demonstrated that the parties are actively working towards resolution a reasonable extension may be permitted. The complainant is provided with a further seven (7) days to notify IR Compliance of the outcome of the resolution process. Such notification can occur verbally or in writing (including email). If the complainant does not contact IR Compliance within the set time-frames, the investigation will be terminated. 	<ul style="list-style-type: none"> If no resolution is achieved IR Compliance will review the information made available by both parties and determine whether the matter should proceed to investigation. If a matter is to be concluded at pre-investigation stage, the complainant and employer will be advised of the reason(s) for this decision. Complainants will be provided with advice regarding other alternative avenues (e.g. small claims action through a local court) if the complaint remains unresolved. Both the complainant and the employer will be informed if the matter proceeds to investigation.

3. Formal Investigation

What happens to the complaint	How long does it take	What are the next steps
<p>During an investigation IR Compliance will:</p> <ul style="list-style-type: none"> • identify the alleged breaches of relevant IR Compliance laws. • gather relevant evidence concerning the alleged breaches through written requests to the employer, or where required, the issuing of a Notice to Produce Information. • conduct interviews with relevant parties as required to assess the basis of the allegations and to seek further evidence. • if appropriate, undertake enforcement, penalty and/or prosecution action. <p>The Investigator will:</p> <ul style="list-style-type: none"> • within five (5) working days contact both parties to explain the formal investigation process. • maintain regular contact with the parties during the investigation to advise of progress or any factors impacting upon the expected timeframe. • manage the expectations of the parties regarding the possible outcomes of the matter. • progress the investigation in a timely manner. 	<ul style="list-style-type: none"> • Generally, less complex matters will be concluded within 8 weeks. • This allows sufficient time for evidence to be gathered and provides the opportunity for the employer to respond to the alleged breaches. • IR Compliance makes every effort to ensure matters can be resolved within the identified timeframe, however some circumstances may impact upon this timeframe including, for example: <ul style="list-style-type: none"> ○ The ability to locate and communicate with the employer ○ Annual closedowns of business ○ Extended illness of either party ○ Obstructive behaviour ○ Structural business changes ○ Availability of relevant records 	<p>Investigations can be terminated at any time where:</p> <ul style="list-style-type: none"> • the employer demonstrates compliance with NSW IR laws and (where practical) the identified breach is rectified; or • the complainant fails to provide information requested by IR Compliance within a reasonable timeframe; or • there is insufficient evidence to support a breach of NSW IR laws. <p>Both the parties will be advised of the reason(s) for a decision to terminate an investigation.</p> <p>At any time following the expiry of the <i>Notice to Employer</i>, the Investigator may recommend prosecution action where compliance has not been achieved.</p> <p>Any recommendation to commence prosecution action will be considered in accordance with the steps outlined at Part 5 of this policy.</p>

4 Sanctions for non-compliant behaviour

Section 385 of the *Industrial Relations Act 1996* provides IR Compliance Inspectors (Investigators) with powers to impose compliance sanctions against identified non-compliant behaviour. Similar powers are also provided under other industrial relations laws e.g. *Long Service Leave Act 1955*.

- (i) **Notice to Employer:** An Investigator may issue a Notice to Employer requiring the employer to:
- rectify past non-compliance; and/or
 - demonstrate current and continuing complying behaviour.

The Notice to Employer provides the employer with a nominated period to respond. Once beyond this period, the Investigator may institute an administrative penalty (where available) and/or institute prosecution action.

- (ii) **Administrative penalty:** For offences prescribed as General Penalty Notice (GPN) offences by the [Industrial Relations \(General\) Regulation 2015](#), an Investigator may issue a GPN in accordance with this policy. A GPN is a sanction which can be issued by an Investigator to penalise an employer who has committed an offence under the [Industrial Relations Act 1996](#).
- Not all offences under the *Industrial Relations Act 1996* can be dealt with by a GPN. [Schedule 2](#) of the [Industrial Relations \(General\) Regulation 2015](#) identifies 12 offences where an Investigator may issue a Notice against an employer. Currently, the penalty applied by the Act is \$220.00.
 - The issue of a Notice may be used as a compliance tool in place of prosecution action. However, if the prescribed penalty is paid, the employer is not liable for further proceedings for the alleged offence ([section 396\(3\)](#) of the [Industrial Relations Act 1996](#)). That is, once the penalty is paid, no prosecution action can be taken.
 - The [Fines Act 1996](#) deals with the situation where an employer elects not to pay the Notice and have the matter determined by a court.

- (iii) **Prosecution:** An Investigator may recommend that an employer be prosecuted for any prescribed criminal offence or breaches of NSW IR laws in accordance with this policy.

4.1 Applying compliance sanctions

In determining the appropriate sanction to be imposed, IR Compliance will have regard to a range of factors including the seriousness of the alleged breach, the quality of available evidence and the cooperation or otherwise of the employer.

Once an alleged breach of NSW IR laws has been identified by the Investigator the **Minimum Penalty Framework** must be applied. That is, once sufficient evidence of the breach is obtained, there is no discretion not to act. Any such action must be considered and approved by the Manager, Compliance.

To ensure transparency in the decision-making process and the basis of all compliance action can be understood by the parties, a minimum penalty framework applies to all identified breaches of NSW IR laws as described in the following table.

Minimum Penalty Framework		
Type of investigation	Breach identified	Minimum penalty
Complaint Investigation	Underpayment of remuneration	Notice to Employer
	General Penalty Notice offence as prescribed in Schedule 2 of the Industrial Relations (General) Regulation 2015	General Penalty Notice
	Any other offence prescribed by NSW industrial relations legislation i.e. breach of Long Service Leave Act 1955	Notice to Employer

4.2 Applying leniency in defined circumstances

The minimum penalty framework may be moderated in instances where defined circumstances exist, or the employer demonstrates complying behaviour during the investigation.

Accordingly, an Investigator may recommend to the Manager, Compliance that a more lenient penalty (formal caution) be applied to an identified breach only where the employer exhibits any of the following circumstances or behaviour:

- (i) where the employer has commenced employing workers for the first time within three months prior to the commencement of the investigation;
- (ii) where the employer has purchased or taken control of the business within three months prior to the commencement of the investigation;
- (iii) if the identified breach involves underpayments of entitlements, where the employer demonstrates full rectification of breaches to current and (where practicable) former employees or a schedule of payments to rectify breaches within three months of the date of the Notice to Employer.

Leniency is unlikely to be considered for an identified breach if the employer (including a director or person involved in the management of the corporation) has been found to have breached NSW IR laws within the previous two years. While an Investigator may recommend that leniency be applied to the application of a penalty, this is to be approved by the Manager, Compliance having regard to all the circumstances of the matter.

Formal Caution: An Investigator may issue a Formal Caution where the employer's non-complying behaviour has ceased, or the employer is unlikely to continue to engage in non-complying behaviour in the future.

A Formal Caution is provided to the employer in writing. A Formal Caution clearly states the specific area(s) of non-compliance which are the subject of the Formal Caution. A Formal Caution may indicate whether IR Compliance intends undertaking a further investigation of the employer at a future date.

5 The decision to prosecute

In cases where serious breaches of the law have been established during an investigation, prosecution action against the employer will be considered. These matters are considered on a case by case basis based upon a range of factors, including:

- the circumstances of each case; and
- the public interest.

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 considered. Prosecution action may also be considered where an emerging trend/issue is occurring and no precedent is available on interpretation of the legislation.

5.1 Penalty framework

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

5.2 Prosecution panel

The role of the Prosecutions Panel is to:

- endorse or refuse to endorse investigations submitted for prosecution having regard to the public interest and other relevant factors;
- manage the consistent application of compliance enforcement and prosecution activities;
- review any investigation withdrawn from prosecution; and
- make recommendations to the Executive concerning the direction of prosecution and related legal policy developments.

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.

5.3 Public interest guidelines and other criteria

When an Investigator's recommendation for prosecution is approved by the Manager, Compliance it will be forwarded to the Prosecution Panel (the Panel). The Panel will determine whether prosecution of the matter is in the 'public interest'. The Director, Compliance will forward the Panel's recommendation to the Executive 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 in the first instance to achieve compliance.

A decision regarding whether or not to prosecute a matter will 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 offence or should otherwise be considered 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 a potential prosecution is in the public interest 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 circumstances of each case. IR Compliance will communicate any decision to prosecute a matter to the complainant.

6 Review of decision

Upon finalisation of the complaint by IR Compliance, both parties will be advised of the outcome of the matter. In conjunction with the commitment of IR Compliance to providing a high level of customer service, citizens can seek a review of the decision in circumstances where there is evidence to indicate the complaint was not managed in accordance with this policy, or conducted in a procedurally fair manner.

Any request for review of a decision must be lodged within 28 days from the date of final correspondence regarding the outcome of the complaint.

Reviews of complaints will be undertaken by the Senior Investigator or Manager, Compliance and will consider the following factors:

1. The policy and relevant legislation has been correctly applied.
2. All relevant material has been properly considered.
3. The complaint has been managed in accordance with the framework of this policy.
4. The complaint has been managed in a procedurally fair manner.
5. Reasons for any delays in identified timeframes have been appropriately documented.
6. Both parties have been provided with reasonable opportunity to respond to requests for information.
7. The findings of the complaint are based upon available evidence.

Reviews into the handling of complaints must be completed within 28 days of the request being received. Upon completion of the review, correspondence advising of the outcome will be provided to the requesting party. The outcome of the review will record one of the following determinations.

1. The conduct and outcome of the Investigation was correct and in accordance with this policy and no further action is required.
2. The conduct of the Investigation was in accordance with this policy however further Investigation is recommended in consideration of identified issues.
3. The conduct of the Investigation was not in accordance with this policy and further Investigation is recommended in consideration of the policy process and application.

7 More information

Further information about the role of IR Compliance in investigating breaches of NSW IR laws through the following channels:

1. Visit the website at www.industrialrelations.nsw.gov.au
2. Contact the Advisory Service on 13 16 28 between 8.30am and 5.00pm weekdays or complete an [online enquiry](#)
3. Write to IR Compliance at GPO Box 5469, Sydney NSW 2001
4. For translating and interpreting services call 131 450 (24-hour service)