

REPLACEMENT EXPLANATORY STATEMENT

Fair Work Act 2009 Direction to Inspectors (November 2021)

(Issued by the authority of the Fair Work Ombudsman)

Background

By reason of subsection 700(1) of the *Fair Work Act 2009 (FW Act)*, the Fair Work Ombudsman is empowered to appoint Fair Work Inspectors. Under subsection 704(3) of the FW Act, Fair Work Inspectors, in the performance of their functions or the exercise of their powers as Fair Work Inspectors, are required to comply with directions made by the Fair Work Ombudsman pursuant to subsection 704(1).

On 22 November 2021 the Fair Work Ombudsman made the Fair Work Act 2009 Direction to Inspectors (November 2021) (**Direction**) under subsection 704(1) which replaced a previous Direction in the form of Legislative Instrument F2015L01907.

On 14 January 2022 the Scrutiny of Delegated Legislation Committee Secretariat sought information from the Fair Work Ombudsman in relation to any policies incorporated by reference into the Direction. This statement has been amended to provide further information regarding the relevant policy that must be complied with under the Direction, the manner of its incorporation, and how it may be accessed.

Consultation

No consultation was undertaken pursuant to section 17 of the *Legislation Act 2003* because the Direction is unlikely to have a direct, or substantial indirect effect on business and is unlikely to restrict competition.

The Direction is technical in nature and does not substantially alter existing arrangements provided for in the FW Act.

The Direction exists to ensure that when commencing or taking any steps in a litigation, that Fair Work Inspectors appointed by the Fair Work Ombudsman, perform their functions and/or exercise their powers in accordance with policies of the Office of the Fair Work Ombudsman and, have obtained the appropriate consent.

Notes on clauses

Clause 1

This clause requires Fair Work Inspectors, before **commencing litigation** to:

- a. comply with any policy of the Office of the Fair Work Ombudsman concerning commencing litigation; and
- b. obtain the Fair Work Ombudsman's consent or the consent of a member of staff of the Office of the Fair Work Ombudsman authorised by the Fair Work Ombudsman to give such consent.

The relevant policy for the purposes of this clause is the Compliance and Enforcement Policy.

The Compliance and Enforcement Policy provides information about how the Fair Work Ombudsman performs compliance and enforcement functions under section 682 of the FW Act. An example of this is that the Policy outlines the public interest factors which will be considered before the Fair Work Ombudsman determines to commence (or not commence) litigation.

The Compliance and Enforcement Policy is incorporated by reference into the Direction as at the date the Direction was made.

The Compliance and Enforcement Policy as at the Direction was made can be found on the Fair Work Ombudsman website at: <https://www.fairwork.gov.au/about-us/accountability/our-policies>.

Clause 2

This clause provides a definition for **commencing litigation** in Clause 1 of the Direction.

Clause 3

This clause requires Fair Work Inspectors, before **taking any steps in a litigation** to:

- a. comply with any policy of the Office of the Fair Work Ombudsman concerning litigation; and
- b. obtain the Fair Work Ombudsman's consent or the consent of a member of staff of the Office of the Fair Work Ombudsman authorised by the Fair Work Ombudsman to give such consent.

As above, the relevant policy is the Compliance and Enforcement Policy.

Clause 4

This clause provides a definition for **taking any steps in a litigation** in Clause 3 of the Direction.

Clause 5

This clause specifies when the Direction will commence. The Direction will commence on the day that it is registered on the Federal Register of Legislation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

(Prepared in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument provides a Direction to Fair Work Inspectors who seek to commence and/or take any steps in a litigation on behalf of the Fair Work Ombudsman. It pertains to the internal administrative arrangements for Fair Work Inspectors taking such action, and is of a general nature.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

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