



Australian Government

**Office of the Australian Building and
Construction Commissioner**

“Public Interest” Guide

What is in the “public interest” is not an exact science.

However, it is hoped that this guide will provide some assistance in determining whether there is public interest in:

- investing resources (and, if so, to what extent) into particular investigations; and
- commencing civil penalty litigation in respect of contraventions of Cth WR Laws under the FW Act and the BCII Act.

It is **important to note** that determining whether public interest exists is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision. Also, no one single consideration outweighs any other.

What needs to be considered is the **totality of all of the relevant issues** and unlawful conduct to determine whether there exists public interest.

As such the decision maker charged with the making of a discretionary decision (such as whether public interest exists) has some latitude as to the decision to be made.

The correctness of the decision should only be challenged by showing error in the decision-making process or some fundamental error.

Within the ABCC, questions about public interest, in so far as they relate to:

- investigation resources rest with the Directors; and
- the commencement of civil penalty litigation, rest with the Prosecution Committee (however, submissions to the Prosecution Committee should canvass public interest grounds).



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In the matter of the proposed civil penalty litigation to be commenced against: ABCC v

	Consideration	Factors suggesting that that public interest <u>does</u> exist	Factors suggesting that public interest <u>does not</u> exist
1	Nature and circumstances of the alleged contravention		
	<p>The seriousness of the alleged contravention or, conversely, the triviality of the alleged contravention, including whether it is of a “technical nature” only.</p> <p>For example: it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing litigation in respect of any allegation of coercion or any contravention of Freedom of Association.</p>		
	The actual or potential consequence of the alleged contravention.		



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	Consideration	Factors suggesting that that public interest <u>does</u> exist	Factors suggesting that public interest <u>does not</u> exist
	The prevalence within the community of the alleged contravention.		
	Mitigating or aggravating circumstances. For example: <ul style="list-style-type: none">• Mitigating factors might include that there is no evidence admissible in a court that the alleged wrong-doer either deliberately or recklessly contravened the law and, when it was brought to their attention by the ABCC (or before the ABCC’s investigation began), the alleged wrong-doer readily rectified the contravention and put in place systems to ensure that no contraventions will occur in the future.		



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	<ul style="list-style-type: none">Aggravating circumstance might be that the alleged wrong-doer defied Court or tribunal orders intended to address the conduct, reneged on a plan to rectify the contravention agreed to with the ABCC or refused or impeded all other attempts at voluntary compliance.		
	Any other relevant circumstances.		
2	Characteristics of the alleged wrongdoer		
	<p>The degree of culpability of the alleged wrongdoer in connection with the contravention.</p> <p>For example:</p> <ul style="list-style-type: none">The degree or extent to which the alleged		



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	<p>wrongdoer acted in accordance with any advice given by the ABCC or other statutory authority in relation to complying with a duty or obligation under Cth WR Laws;</p> <ul style="list-style-type: none">• The relevant compliance history of the alleged wrongdoer (including the alleged wrongdoer’s response to the ABCC’s previous enforcement and prevention activities); and• The attitude of the alleged wrongdoer (including any relevant proactive measures taken to comply with Cth WR Laws).		



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	Consideration	Factors suggesting that that public interest <u>does</u> exist	Factors suggesting that public interest <u>does not</u> exist
	Relevant history and other relevant characteristics of the alleged wrongdoer (e.g. age, intelligence, physical health, mental health, special infirmity, etc).		
	Subject to any rights or privileges (such as the privilege against self-exposure to penalties), whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so.		
	The level of contrition demonstrated by the alleged wrongdoer.		



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	The degree of involvement of senior management in the alleged contraventions, or the degree of involvement by office holders or members of a registered organisation or other association.		
3	Level of public concern		
	Whether the nature of the alleged contravention is of considerable public concern. n.b. the ABCC assumes that, in all cases, the public is concerned about compliance with Cth WR Laws.		
4	Impact of the offence		
	The attitude to the commencement of litigation which is held by the person who was injured or		



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	otherwise affected by the contravention		
	The impact of the alleged contravention on such persons		
	The impact of the alleged contravention on any other relevant persons (e.g. family members).		
	Any other relevant impact of the contravention.		
5	Deterrence		
	The impact of litigation related action on: <ul style="list-style-type: none"> • general deterrence (i.e. reducing the likelihood that other workplace participants will commit similar contraventions or otherwise contravention Cth WR Laws); and 		



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	<ul style="list-style-type: none">specific deterrence (i.e. reducing the likelihood that the alleged wrongdoer will commit a further contravention of such laws).		
6	Effect of litigation		
	The likely outcome in the event of a finding of contravention, having regard to the penalty options available to the court		
	The availability and efficacy of any alternatives to litigation (e.g. Letters of Caution or Undertakings).		
	Whether the consequences of any resulting finding of contravention would be unduly harsh and oppressive.		



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7	Administrative considerations		
	The necessity to maintain public confidence in the administration of Cth WR Laws.		
	The likely length and expense of litigation.		
	Whether the commencement of litigation would be perceived as counter-productive, for example, by bringing the law into disrepute.		
	The staleness of the alleged contravention.		
8	Any other relevant considerations		



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We agree with the assessment of public interest above:

.....

Executive Director Operations [Region]

Date:

.....

Group Manager, Field Operations

Date: