

National Follow Up Campaign Final report

August 2010

TABLE OF CONTENTS

Summary	1
Background	2
Campaign Aim and Objectives	2
Methodology	3
Results.....	3
❖ Entities targeted by FWO history.....	3
❖ Entities targeted by industry.....	4
❖ Entities suitable for audit.....	5
❖ Outcome of audits	5
○ by FWO history	5
○ by region.....	6
❖ Contraventions.....	6
○ Rate of contraventions by industry.....	7
○ Types of contraventions by region	7
❖ Money recovered for employees.....	8
Other Findings by Region.....	8
Concluding Remarks.....	10
Appendix A – Appendix B – List of Industrial Instruments	

Summary

As one of its four annual national campaigns, the Fair Work Ombudsman [FWO] conducted the National Follow Up Campaign between January and May 2010.

The aim of the campaign was based upon our decision to literally ‘follow up’ those businesses that had previously attracted the attention of the FWO and evaluate the effectiveness of prior compliance treatment in achieving behavioural change and long term compliance.

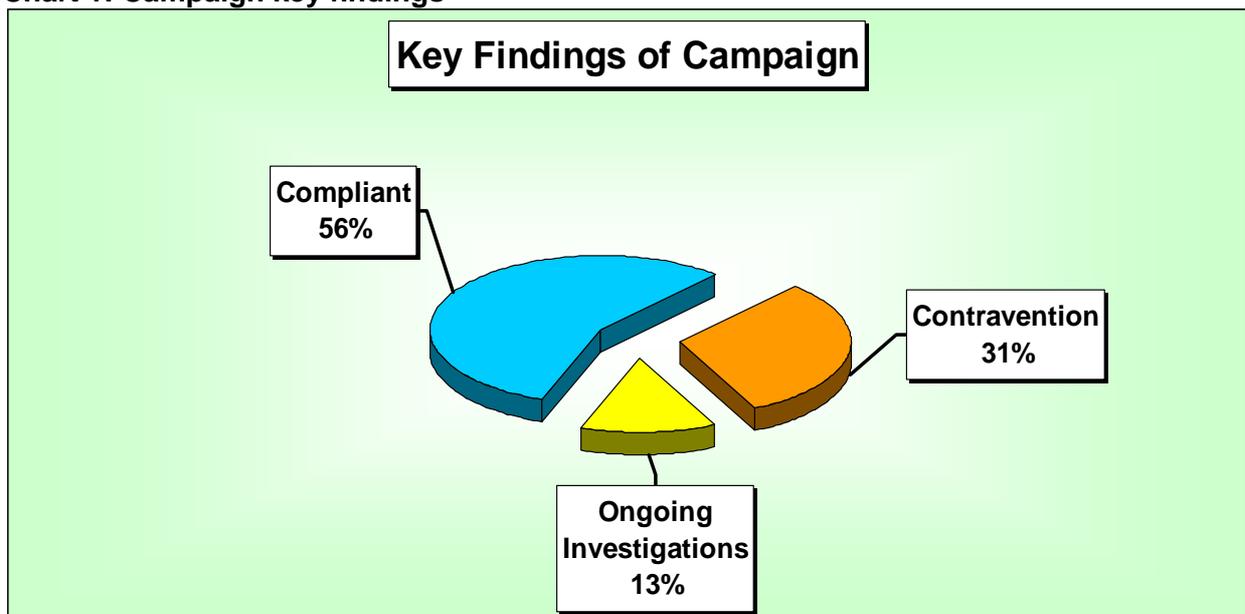
The campaign targeted employers we suspected may not be complying with workplace relations laws, despite previous interaction with the FWO. The target list was comprised of entities that had either a non compliance history or Fair Work Inspectors had held concerns regarding their level of engagement during a previous investigation/audit. We also selected those entities we had previously provided assistance to, in the form of education.

Fair Work Inspectors commenced the campaign by writing to 465 employers advising they had been selected for audit. The majority (79%) of the entities chosen for audit were from a previous investigation into a complaint, 18% were from a previous targeted audit, and a further 3% were selected for audit as a result of new intelligence acquired by the FWO.

The selected entities’ industry classification (ANZSIC)¹ paralleled the industries that attract the majority of FWO complaints and Client Contact Centre calls. The top two industry sectors in the selection were from the accommodation and food services sector (39.4%) and the retail sector (20.4%).

The key finding of the campaign was that of the 358 audits undertaken, we found just over half (56%) of the employers were complying with the Commonwealth workplace relations laws. Of concern, was the number of employers (31%) found not to be complying (with a combined total of 162 contraventions) and the remaining employers (13%) requiring ongoing investigation.

Chart 1: Campaign key findings



¹ Australian and New Zealand Standard Industrial Classification

An analysis of the 162 contraventions identified shows that 98 (60%) contraventions related to underpayments, 29 (18%) contraventions related to record keeping requirements and 35 (22%) contraventions related to pay slip requirements.

An analysis of contraventions by industry shows that the industries with the highest percentages of underpayment of wages were accommodation and food services and administrative support services. The industries with the highest number of record keeping and payslip contraventions were transport, postal and warehousing, health care and social assistance and construction.

As at 31 July 2010, we had recovered \$314,194 for more than 695 workers. Due to ongoing investigations arising from the audit, the amount of money recovered for employees is likely to increase. We consider the non compliance rate of 44% to be of concern, particularly as most of these employers had been the subject of either a previous investigation or audit. The 13% of employers still under investigation are also likely to be in contravention and as repeat offenders will be assessed against our litigation policy to determine further appropriate action.

In noting that the campaign coincides with significant national workplace law reform, the campaign's findings have reinforced the importance of continued educational support, contact with industry as a whole and this type of follow up intervention.

Background

The FWO undertakes four national targeted campaigns each year, and each state undertakes a further two regional campaigns each year. Our campaigns have an educational focus, and when we find an employer to be in contravention of Commonwealth workplace relations legislation, we aim to work with the employer to achieve voluntary compliance. As a result, a high level of voluntary compliance is achieved in the immediate term.

The FWO is committed to ensuring effective and sustainable compliance. For instance, in 2009 the FWO Queensland office undertook a follow up of employers audited in the Queensland Clubs Campaign 2008 and successfully recovered a significant amount of money in addition to, publicly demonstrating that the FWO, as the regulator, is in this business for the 'long haul'.

In addition to undertaking audits, we also conduct a significant number of investigations in response to complaints. In the 2008/09 financial year we received 22,670 complaints. Being the workplace regulator, the public expects the Fair Work Ombudsman to ensure businesses continue to 'do the right thing' following a FWO compliance intervention.

Accordingly, we considered a National Follow Up Campaign would provide us with the opportunity to determine the degree that compliance is maintained in the long term and send a strong message to industry that 'we would be back'.

Campaign Aim and Objectives

The aim of the National Follow Up Campaign was to measure long term compliance with the Commonwealth workplace relations legislation.

The specific objectives of the campaign were to:

1. Identify employers who had previously been found to be non compliant with Commonwealth workplace relations legislation as a result of either
 - complaint investigation, or

- audits undertaken as part of our national or regional campaigns.
2. To undertake an audit of a sample of these employers to identify their current level of compliance with Commonwealth laws
 3. To analyse the findings of these audits with the view to:
 - identify if long term compliance has been maintained
 - measure the effectiveness of both our investigation and audit processes
 4. To provide a public report on the findings of the campaign

Methodology

Using our client database history and intelligence obtained from Fair Work Inspectors, each state of Australia, selected a sample number of employers for a follow up audit.

The employers included a selection of employers found to be non compliant in previous investigations and/or audit programs undertaken by the FWO.

We mainly selected employers suspected of not complying with the *Fair Work Act 2009* based upon their previous compliance history, level of engagement during previous investigations/audits or previous investigation findings.

Employers selected covered a range of industries, predominantly accommodation and food services, retail, transport, postal and warehousing, manufacturing, administrative support services (including the cleaning services industry) and construction.

Initially we wrote to the targeted employers informing them about the campaign and notifying them that they had been selected for a follow up audit.

The follow up audits included an assessment of time and wage records, pay slip details, wage payments and any additional indicators considered to be appropriate. The audits were carried out in accordance with the Fair Work Ombudsman's audit processes and included a number of random field visits.

Results

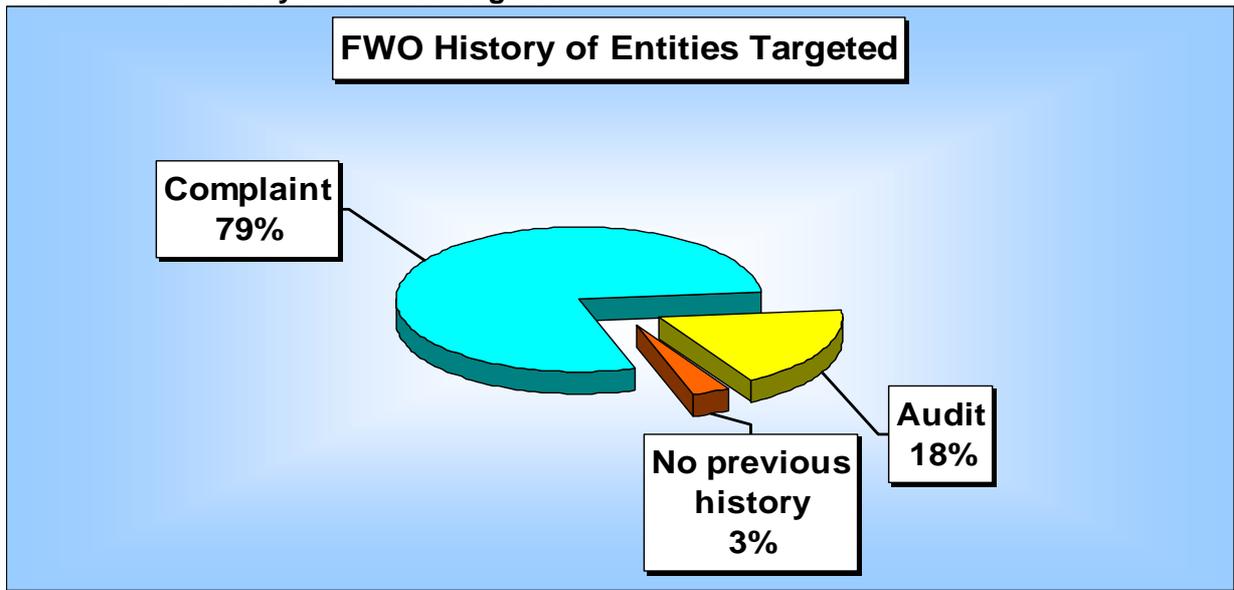
As at 31 July 2010, we undertook the following detailed statistical analysis of the audit. Please note as some investigations are ongoing, some findings, particularly the amount of money recovered on behalf of employees, may vary in the future.

Entities targeted by FWO history

Of the 465 entities chosen, the majority, 364 (78%), were selected as a result of a previous investigation into a complaint, 85 (18%) were selected from a previous targeted audit, and a further 16 (3%) were selected for audit based upon recent intelligence despite the entities having no previous involvement with FWO.

The following chart illustrates the breakdown of selected entities by previous interaction with FWO.

Chart 2: FWO history of entities targeted

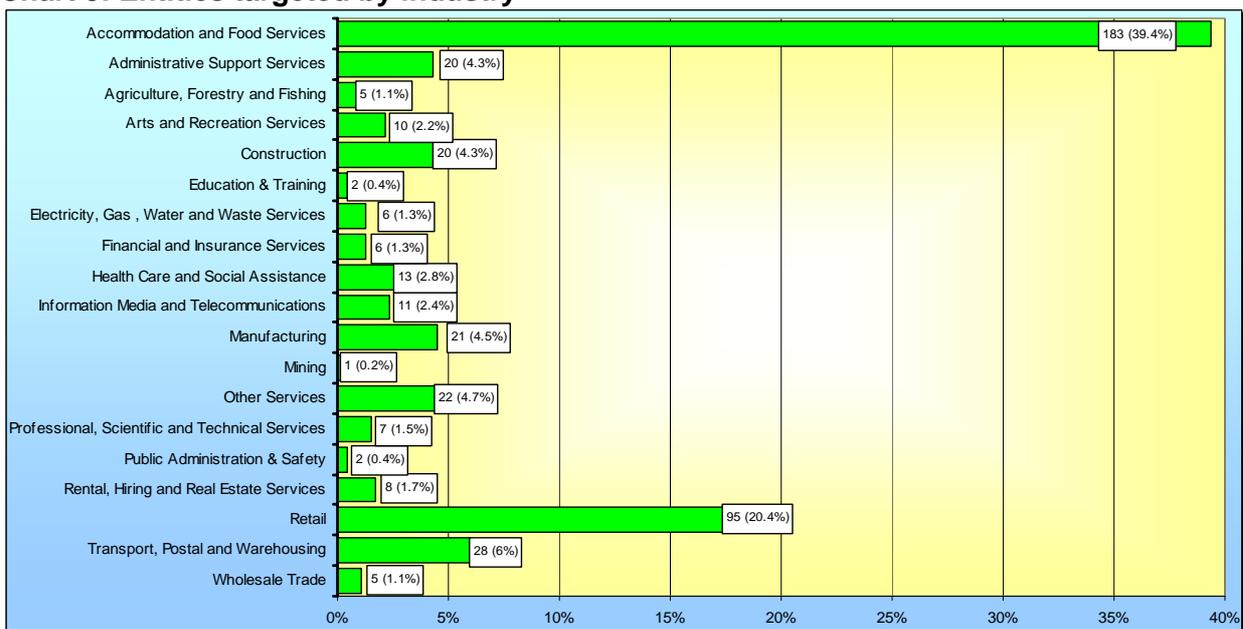


Entities targeted by industry

A breakdown of the selected entities by industry provides interesting parallels with the industry classifications (ANZSIC) that attract the majority of FWO complaints and Client Contact Centre calls. The top two industry sectors audited were accommodation and food services (183 employers - 39.4%) and retail (95 employers - 20.4%). These are followed by transport, postal and warehousing (28 employers - 6%), other services (22 – 4.7%), manufacturing (21 employers - 4.5%) administrative support services (20 employers - 4.3%) and construction (20 employers - 4.3%). Chart 3 below illustrates these findings.

One of the factors which influenced industry selection were the previous national targeted campaigns in the hospitality, food services and transport industries, undertaken by FWO in the last two years.

Chart 3: Entities targeted by industry



Entities suitable for audit

We initially targeted 465 businesses for an Australia-wide follow up audit campaign. However we found that 109 (23%) of the businesses targeted were unsuitable for audit for the following reasons:

- No longer trading – 52 (47.7%)
- No longer can be contacted - 37 (33.9%)
- No longer have employees - 15 (13.8%)
- No longer within our jurisdiction - 5 (4.6%)

This was a surprising finding, considering these were mainly employers we had previously been involved with. The above findings provide an indication of the volatility within the industries selected.

Outcome of audits

Outcomes of the 356 audits undertaken are as follows:

- We found 200 (56%) employers to be compliant
- We found 111 (31%) employers to have incurred a total of 162 contraventions
 - 98 (60%) contraventions related to underpayments
 - 29 (18%) contraventions related to record keeping requirements and 35 (22%) contraventions related to pay slip requirements
- We have yet to finalise 45 (13%) audits as they require further investigation beyond the scope of this campaign. These employers are also likely to be in contravention and as repeat offenders will be assessed against our litigation policy to determine further appropriate action.

Outcome of audits by FWO history

The table below illustrates the outcome of audits based upon whether the selected entities were or were not subject to a previous investigation into a complaint or audit. Interestingly, there is no significant difference in the compliance rate depending on whether FWO's previous intervention was as a result of an investigation into a complaint (58% compliant) or a previous audit (51% compliant).

Table 1: Outcome of Audits by FWO History

Outcome of audits by FWO history				
<i>at 31 May 2010</i>				
	<i>Investigation into a complaint</i>	<i>Previous audit</i>	<i>No previous history</i>	<i>Total</i>
Employers compliant	159 (58%)	34 (51%)	7 (50%)	200 (56%)
Employers found to be in contravention	84 (30%)	23 (34%)	4 (29%)	111 (31%)
Audits not yet finalised	32 (12%)	10 (15%)	3 (21%)	45 (13%)
Totals	275 (100%)	67 (100%)	14 (100%)	356 (100%)

Outcome of audits by region

Table 2 below provides an overview of the outcome of audits by region. It shows that in Victoria only 33% of employers were found to be compliant compared to 68% in Queensland.

Table 2: Outcome of audits by region

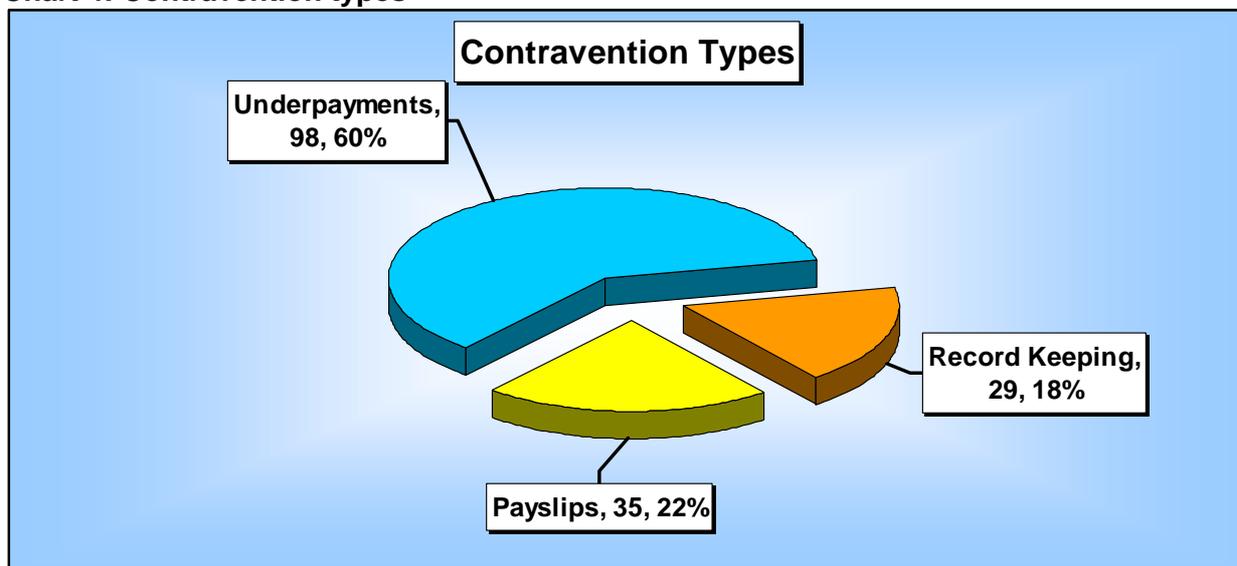
Outcome of audits by region							
<i>at 31 May 2010</i>							
	NSW	VIC	QLD	WA	SA	TAS	Total
Employers compliant	53 (52%)	19 (33%)	76 (68%)	32 (62%)	19 (68%)	1 (17%)	200 (56%)
Employers found to be in contravention	28 (28%)	27 (48%)	29 (26%)	18 (35%)	5 (18%)	4 (67%)	111 (31%)
Audits not yet finalised	20 (20%)	11 (19%)	7 (6%)	2 (3%)	4 (14%)	1 (17%)	45 (13%)
Totals	101 (100%)	57 (100%)	112 (100%)	52 (100%)	28 (100%)	6 (100%)	356 (100%)

Contraventions

Of the 162 contraventions identified 29 (18%) contraventions related to record keeping requirements, 35 (22%) contraventions related to pay slip requirements and 98 (60%) contraventions related to underpayments.

Specifically, 40% of the underpayment contraventions related to incorrect rates of pay, 12% to non payment or incorrect payment of penalty rates and 8% related to allowances.

Chart 4: Contravention types



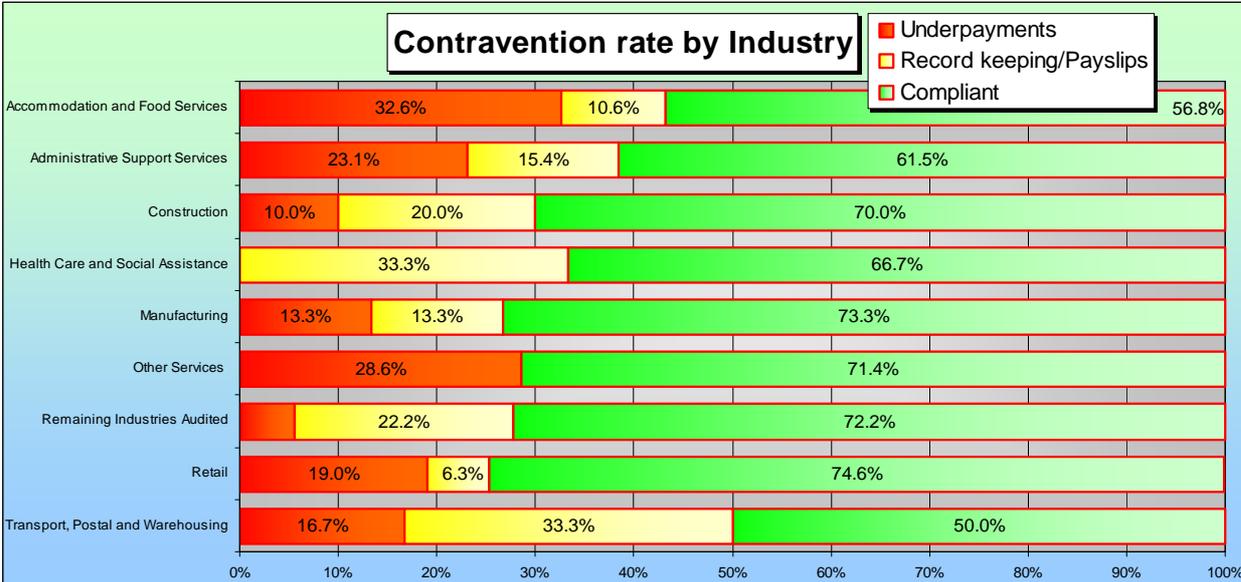
Rate of contraventions by industry

An analysis of contraventions by industry shows that the industries with the highest percentages of underpayment contraventions were accommodation and food services, administrative support services and other services.

The three industries with the highest number of record keeping and payslip contraventions were transport, postal and warehousing, health care and social assistance and construction.

The chart below shows the breakdown of contraventions by industry.

Chart 5: Contravention rate by industry

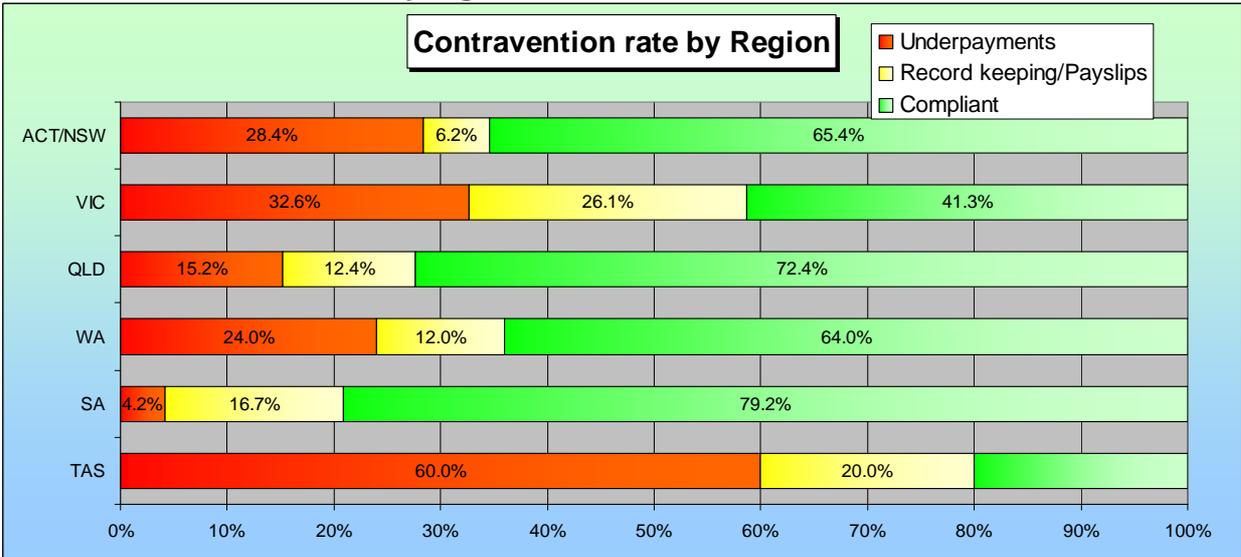


Types of contraventions by region

An analysis of contravention by regions shows that Tasmania (60%) has the highest non compliance in relation to underpayments, whilst Victoria (26.1%) has the highest non-compliance in relation to record keeping. South Australia had the least underpayments contraventions (4.2%) and ACT/NSW the least record keeping and payslip contraventions (6.2%)

The table overleaf illustrates the breakdown of contraventions by region.

Chart 6: Contravention rate by region



Money recovered for employees

We are due to recover a total of \$314,194 for more than 695 workers as a result of this campaign.

Table 3 below shows the breakdown by industry sector. The greatest recovery was from the accommodation and food services sectors which accounted for 48% of the money recovered.

Table 3: Money recovered for employees by industry

Money recovered for employees by industry		
<i>Correct at 31 July 2010</i>		
	Amount of money	Number of employees
Accommodation & Food Services	\$151,858	530
Retail	\$63,633	49
Manufacturing	\$4,314	3
Transport	\$41,698	35
Administration and Support Services	\$32,420	64
Other Services	\$16,598	2
Remaining Industries	\$3,673	12
Total	\$314,194	695

An analysis of money recovered by region shows that NSW accounted for 38% of money recovered, followed by Western Australia with 22% of total recoveries. Victoria accounted for 18% of money recovered.

Table 4: Money recovered by region

Money recovered by region							
<i>Correct at 31 May 2010</i>							
	NSW	VIC	QLD	WA	SA	TAS	Total
Amount of money	\$120,442	\$55,887	\$50,025	\$69,480	\$503	\$17,857,	\$314,194
Number of employees	324	59	127	170	1	14	695

Other Findings by Region

The campaign identified the following issues in each region.

New South Wales / ACT

In New South Wales, employers were generally co-operative with Fair Work Inspectors and responded quickly to our requests for additional records. They showed a willingness to seek out additional information on workplace law changes, and on the availability of tools to assist them to comply.

When contraventions were found, some employers had difficulty calculating back payments and some small business employers did not have the resources to undertake these calculations. This was resolved by either granting an extension of time to enable

employers to perform the calculations, and/or we provided sample calculations to assist employers in their understanding of the requirements.

A significant number of the employers found to be in contravention were franchisees of multinational fast food chains and some restaurant chains. These employers promptly rectified their contraventions. Generally, these employers worked with sophisticated record keeping and pay slip software, and demonstrated good record keeping practices. The majority of their contraventions related to underpayments. Typical examples included incorrect payment of overtime, penalty rates and junior pay rates. Penalty rates were often incorrectly applied in the calculation of casual wages, and allowances were incorrectly applied or omitted for certain staff.

There were also issues surrounding enterprise² agreements. Some employers were unable to access or confirm the existence of their enterprise agreements. In some cases, they did not have a copy of their workplace agreement, A few entities with enterprise agreements had not adjusted their rates of pay following minimum rate rises determined by the Australian Fair Pay Commission.

The majority of small business employers audited by NSW tended to be from niche industries, and had their employees under common law contracts. Some employers were, mistakenly, under the impression that they were working in an award free environment. We conducted further research regarding applicable awards and advised the affected employers accordingly. Instances such as this confirm the value of a follow up campaign where Fair Work Inspectors can educate employers about their obligations in the new workplace relations environment.

Victoria

We were pleased to note that a good proportion of employers selected for the follow up audit in Victoria had learned from their previous experience with FWO, many of them now implementing good systems to ensure compliance with their employer obligations.

However in spite of this, the results show Victoria to have the lowest compliance result in the country.

The payments we recovered were for a relatively large number of employees, and consequently the amount of underpayment for each individual employee was minimal.

It was noted that some employers expressed concern that we were auditing them too soon after the initial investigation or audit

Queensland

We found clear evidence that our initial audit campaign in Queensland had made a difference. In the follow up audits, many employers were able to provide exact details of their applicable industrial instrument including the correct code (for example NAPSA AN140070). Importantly many employers who had previously been found in contravention were now paying in accordance with the correct industrial instruments.

There also seemed to be a relatively large number of employers who were either members of industry associations or used external bookkeepers. We had the impression that this was a result of them wanting to ensure they maintained compliance following our initial intervention.

It was pleasing to find that the majority of employers were positive about the follow-up audit and responded quickly to our initial requests for records. Very few complained about us following up on our previous contact, as they understood that this was a necessary part of our role. Employers also demonstrated their willingness to work with

² Formerly collective agreements pre 1 January 2010

us to rectify any identified contraventions. The three industries in which most contraventions were found were in hospitality, construction (painters and small building construction) and the meat industry. Typical contraventions were in relation to employers not paying apprentices correctly, not increasing junior's rate of pay on their birthday and failing to pay staff at higher rates once they passed the introductory stage.

Western Australia

Only 30% of the businesses we targeted in Western Australia supplied their records within the required time period. A further 31% supplied records within two weeks after the due date, and by the end of the campaign, all employers but one had provided their records.

Contraventions included underpayments to employees by a franchisee who owned a number of shops. Since our audit, the franchisee has voluntarily rectified the underpayments and has committed to pay the correct rates. We intend to conduct follow up visits in the relevant fast food chain to educate employers on the correct pay rates. We also intend to follow up businesses which employ workers of cultural and linguistically diverse backgrounds to ensure that their employees receive correct rates of pay.

The consistent issues arising in this campaign were the incorrect calculation or non payment of casual loadings and employers not updating their rates of pay. It was encouraging to see that one restaurant business previously prosecuted by FWO for underpayments is now complying with minimum entitlement requirements.

South Australia

In South Australia, we found most employers to be compliant. As these employers had been audited previously, they understood the process, and as a result promptly provided us with the requested records.

Interestingly those employers who were found to be in contravention had different contraventions to those found in their initial audit. For example, one employer previously identified of having underpayment contraventions, in the follow up campaign was found to have payslip contraventions. Such instances can possibly be linked to the legislative changes which took effect on 1 January 2010.

Tasmania

We found that some small and medium sized Tasmanian businesses had underpaid workers their correct hourly rate and, in some instances, had not paid penalty rates. We also found minor record keeping contraventions.

Some employers were paying workers a flat rate, and the Tasmanian Chamber of Commerce and Industry (TCCI) is currently working with one company to ensure the employer resolves the back payments for the employees which are likely to be substantial.

Concluding Remarks

The majority of employers we selected for audit during this campaign were on the basis of contraventions found during previous investigations or audits, particularly in the high incidence industry sectors of hospitality and retail. It is not surprising, therefore, that the majority of contraventions identified in this audit occurred in these same industry sectors.

We are pleased with the positive response from the majority of employers to our requests for records and, in the main, for willingly rectifying all contraventions, including underpayment of wages.

However, we consider the compliance rate from this follow up audit campaign to be disappointing with 31% of employers found to have incurred a total of 126 contraventions and a further 13% requiring ongoing action. Of equal concern is that 98 (60%) contraventions related to underpayments.

These results confirm the Fair Work Inspectors' intelligence concerning the likelihood of particular employers complying with workplace relations laws based on their history and previous investigation/audit findings.

A further reason for this result could be that we commenced the campaign shortly after the introduction of the Modern Awards and the National Employment Standards in January 2010. Indeed, a key finding from the campaign was that many employers were familiar with the practices of the FWO through either previous complaint investigation or audit processes. However, many remain unfamiliar/non compliant with the requirements of the new workplace laws and regulations. This is evident in both the under and/or non payment of current wage rates, penalties and allowances, particularly to casual staff.

In addition to this explanation of non compliance, Fair Work Inspectors also reported workplace behaviours that were systemic and indicated practices which had continued in the medium to longer term. For example, gaps in employers knowledge of correct pay rates, conditions and the appropriate award, employers not paying apprentices correctly or not increasing juniors' rate of pay and employers underpaying workers due to incorrect calculations or non payment of casual loading.

Whilst this finding may indicate a lack of access to adequate resources which would provide business support (particularly amongst those small businesses in niche industries), the FWO is committed to continuing to develop and promote its proactive educational strategies such as face to face education visits and the various online FWO tools and information systems available. Moreover, advice can be provided via our Fair Work Infoline.

The campaign reinforces our need to continually reassess our methods and practices with a view to effecting behaviour change and thus ensuring long term compliance. The FWO is committed to educating all workplace participants through working in collaboration with industry associations. The campaign's simple reminder to all employers 'we will be back', is a demonstration of the FWO's long term commitment to ensuring compliance with Australian workplace relations laws.

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Appendix A

Industrial Instruments

Listed below are the most common industrial instruments used as part of the National Follow up campaign in each state.

NSW/ACT

- Shop Employees (State) Award (AN120499)
- Transport Industry - Waste Collection and Recycling (State) Award (AN120614)
- Transport Industry (State) Award (AN120594)
- Restaurants, &c., Employees (State) Award (AN120468)
- Most employers audited were in the fast food or restaurant industry and many had collective agreements in place.

Victoria

- Transport Workers' (Refuse, Recycling and Waste Mgt) Award 2001
- Bread Trade (Vic) Award 1998
- The National Electrical, Electronics and Communications Contracting industrial Award 1998
- The Liquor and Accom industry – Restaurants (Vic) Award 1998
- The Property and Business Services Industry Sector Minimum Wage Order (Vic) 1997
- National Fast Food Retail Award 2000
- Commercial Sales (Vic) Award 1999
- Workplace Relations Act 1996
- The Transport Workers Award 1998
- Hospitality Ind – Accom, Hotels, Resorts and Gaming Award 1998
- The Clerical and Administrative Employees (Vic) Award 1999
- The Shop, Distributive and Allied Employees Association – Vic Shops Interim Award 2000

Queensland

- Retail Industry Award 2004 (AN140257)
- Clerical Employees Award 2002 (AN140067)
- Federal Meat Industry (Retail and Wholesale) Award 2000 (AP805114)
- Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South Eastern Division 2002 (AN140144)
- Café Restaurant and Catering Award - State (Excluding South-East Qld) 2003 (AN140052);
- Hairdressers Industry Award - State 2003 (AN140140);
- Transport Distribution and Courier Industry Award - Southern Division 2003 (AN140305);
- Baking Industry Award - Southern and Mackay Divisions 2003 (AN140024).

WA

- Hotel and Tavern Workers NAPSA
- Restaurant, Tearoom and Catering Workers Pay Scale
- The Independent Retail Establishments and SDA Agreement 2002 (AG818072)
- The Standard and FMW
- Egg Processing NAPSA
- Restaurant, Tearoom and Catering Workers' NAPSA
- Contract Cleaners Award 1986 NAPSA
- Recreational Diving Industry Award 2001 (AP812348)
- Transitional Instrument Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980 (AN160222)
- MINCON NAPSA
- Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972 (AN160066)
- Clerks (Commercial, Social and Professional Services) Award No. 14 of 1972 (AN160066)
- Motor Vehicle (Service Station, Sales Establishments, Rust Prevention and Paint Protection), Industry Award No. 29 of 1980 NAPSA
- Transport Workers' General NAPSA

- Transport Workers' General NAPSA
- Dry Cleaning and Laundry Award 179 NAPSA
- Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977(AN160292)
- ITEAs
- Security Officers' Award NAPSA

SA/NT

- Health Services Employees Award (AN150064)
- Hairdressers and Beauty Salons Award (AN150062)
- Hotels, Clubs etc Award (AN150066)
- Transport Workers (South Australia) Award (AN150164)
- Transport Workers (Long Distance Drivers) Award 2000 (AP805988)

TAS

Restaurant Keepers NAPSA
 Restaurant Keepers Pay Scale
 Retail Trades NAPSA
 Security Industry NAPSA