



Australian Government

Fair Work
OMBUDSMAN

Compliance and Enforcement Policy

Table of Contents

Table of Contents	2
Principles.....	4
How the FWO advises, supports and educates.....	6
How the FWO assesses the information we receive	8
3.1 Assessment	8
3.2 What the FWO considers	8
3.3 Action the FWO is likely to take.....	9
How the FWO intervenes	11
4.1 Early intervention	11
4.2 Mediation	12
4.3 Tailored small claims assistance	14
4.4 Investigations	16
1. Section 712A Notices	17
2. Expectations	18
4.5 Proactive compliance campaigns	20
4.6 Proactive Inquiries.....	22
3. Inquiries	22
4. Comprehensive inquiries	22
The range of outcomes.....	24
5.1 Compliance outcomes with FWO	24
1. Findings letter	24
2. Formal caution	25
3. Compliance partnerships	26

5.2 Enforcement outcomes under the FW Act.....	28
1. Infringement Notice	28
2. Compliance Notice	29
3. Enforceable Undertaking	31
4. Litigation	33
Publicising compliance and enforcement.....	33
Working with other government regulators	34
Feedback	34

The Fair Work Ombudsman (FWO) is an independent statutory agency created by the *Fair Work Act 2009* (the FW Act). The role of the FWO is to promote harmonious, productive and cooperative workplace relations; and to monitor, inquire into, investigate, and enforce compliance with relevant Commonwealth workplace laws.

This policy explains how we seek to ensure compliance with Commonwealth workplace laws. By Commonwealth workplace laws, we mean the FW Act, its regulations and the awards and agreements that set wages and conditions for Australian workplaces.

Principles

The FWO wants to promote a culture of compliance by equipping workers and businesses in Australia with the information and support they need to make good choices in their workplaces, and be compliant with Commonwealth workplace laws.

Our work is guided by the following principles:

Principles	We:
Clear and effective communication	<ul style="list-style-type: none"> ■ listen to the workplace concerns of workers and businesses ■ provide information and advice that is easy to access, understand and apply
Professional customer service	<ul style="list-style-type: none"> ■ deliver a relevant and professional experience in every customer interaction ■ offer multiple ways to connect with us ■ provide practical advice and assistance that is timely, professional and impartial ■ ensure the security of our customers' personal details in line with privacy laws
Consistency	<ul style="list-style-type: none"> ■ give practical advice which can be relied upon ■ ensure a level playing field where the same rules apply to everyone ■ apply the same assessment principles to each request for assistance ■ consider the same range of factors when deciding how to assist
Risk-based and proportionate	<ul style="list-style-type: none"> ■ focus our compliance and enforcement efforts where there is serious non-compliance and where we can deliver the greatest benefit

	<ul style="list-style-type: none"> ■ consider risk in terms of potential impact on the community, as well as the relative risk of exploitation that individuals face ■ encourage and empower employees and employers to resolve issues in their workplace, where appropriate ■ offer a range of dispute resolution tools and resources
Open and transparent	<ul style="list-style-type: none"> ■ remain neutral and impartial ■ give parties (to a dispute) the right to review all our decisions ■ publish information on our compliance and enforcement activities in a format that is fair, clear, understandable and accessible
Collaborative	<ul style="list-style-type: none"> ■ build relationships with stakeholders and the community based on trust and respect ■ work with customers to find solutions to workplace issues and opportunities to collaborate ■ harness intelligence and insight from a range of sources including other government agencies to inform our compliance and enforcement activities
Continuous improvement	<ul style="list-style-type: none"> ■ listen and respond to the community's expectations of us ■ measure the impact of our interactions with customers and use this information to improve our work ■ seek feedback on our processes, policies and practices and make changes to improve them ■ adopt leading technologies to ensure our services are more efficient and effective
Affect cultural change	<ul style="list-style-type: none"> ■ work with business, unions, community groups and other government agencies to develop solutions which address structural and behavioural drivers of non-compliance in certain industries and sectors ■ focus our efforts on supporting productivity by preventing workplace disputes ■ inform the public regularly and frequently on the importance of understanding workplace rights and obligations ■ share the stories of businesses dedicated to building compliant, productive and inclusive workplaces

How the FWO advises, supports and educates

The FWO encourages people to access our online tools and resources to increase their understanding of workplaces laws, find answers, and conduct open and constructive conversations in the workplace. For most people, a better understanding of workplace rights and obligations means that they can resolve issues at the workplace level without formal intervention from us. We have a suite of online tools and resources, with a range of in-language resources, that support this work, including:

- A [Pay and Conditions Tool \(PACT\)](#), which calculates pay rates, penalty rates and allowances, leave, notice of termination and redundancy.
- A '[Record My Hours](#)' app which can be downloaded to a mobile phone, allowing the user to keep an accurate record of their working hours as well as other information about their employment.
- A web translator function that offers automatic in-language content in 40 languages and translated resources and videos in the top 16 priority languages.
- [My account](#), which allows users to save, tailored information and submit online enquiries and receive responses (on matters such as pay rates and conditions of employment) directly to their individual account. Users can log into their personalised My account and view their saved information at any time. Users can also submit individual enquiries and receive tailored responses based on their circumstances. [Webchat](#) is also available for registered My account users, seeking quick answers, advice or guidance.
- An [anonymous reporting tool](#) that enables the public to report concerns about workplace issues anonymously. The tool is available in multiple languages, allowing customers to report workplace issues to the FWO in their language with the knowledge that their identity will not be disclosed.
- An [online learning centre](#) that has video-based interactive courses to teach businesses and workers skills and strategies to help them at work.
- [Fact sheets](#) about the minimum rights and obligations of businesses and workers, including information on the National Employment Standards, record-keeping and pay slips.
- [Best practice guides](#) to help small to medium-sized businesses with implementing best practice workplace policies and procedures.
- [Templates](#) that simplify the requirements for keeping employment records.
- A [telephone translator service](#) operated by the Translating and Interpreting Service on 131 450.

CASE STUDY – Self-help tools

Ally is a small business owner and she recently signed up to FWO's My account service to save information on the award conditions of employees. Having this tailored information saved on her My account means that Ally can easily access relevant resources when she needs them.

When one of her employees queried their rate of pay on a public holiday and their uniform allowance, Ally logged into her My account to check the provisions under the award. After reading the information and using the FWO's Pay and Conditions Tool, Ally believed she was paying the correct entitlements but wanted to check her understanding with an expert. As she was busy during business hours, Ally lodged an online query through her My account later that night to clarify her understanding of the applicable pay rates and allowances.

After receiving and assessing the enquiry the next day, a FWO officer responded to Ally via My account and confirmed the penalty rates applicable for public holidays and the circumstances when a uniform allowance would be paid. Ally had been paying the correct penalty rates on the public holidays, and the employee wasn't entitled to a uniform allowance. The officer saved the relevant information about the entitlements for Ally so she could feel confident that she was paying the correct entitlements. The officer also linked to some educational resources from the FWO's Online Learning Centre to help Ally feel confident in approaching the discussion of these issues with her employee.

When the employee disagreed with the information during their meeting, Ally logged onto her My account and they went through the information together, including using the Pay and Conditions Tool. They printed the pay rates and pinned them on the noticeboard so that all employees were aware of the minimum rates of pay.

How the FWO assesses the information we receive

The FWO receives many requests for assistance from workers who have a dispute about their wages or other issues with their employer. We describe the worker and the business in these cases as ‘the parties’ to the request for assistance.

One of our key functions is to respond to people who are directly seeking information and help, and this policy explains how those requests for assistance are treated.

We also initiate our own activities, such as campaigns and inquiries. These activities are based on information that comes to us from a range of sources - including intelligence, anonymous tip offs, research and requests for assistance.

Our priorities are determined by analysing all of this information and directing our resources to where they are most needed and where they will have the most positive impact.

3.1 Assessment

When the FWO receives a request for assistance or we are alerted to a possible workplace dispute, experienced officers assess the situation to decide how we can best help.

We understand that not everyone or every situation needs the same type of assistance. We provide tailored assistance based on an individual’s circumstances, the issues at the workplace and the situation more generally.

3.2 What the FWO considers

In deciding how we will act, the FWO considers the seriousness of the alleged conduct and the circumstances of the parties, as well as the practical issues involved in resolving the matter.

There are a range of factors we consider including:

- the public interest (whether the community would expect us to get involved)
- FWO priorities based on our intelligence and experience, as well as stakeholder input
- whether a party is facing significant barriers to resolving the matter themselves (for example, low levels of literacy or comprehension)
- the size of the business and extent to which it sought advice from appropriate experts
- whether a party has had previous issues with compliance
- whether any alleged breach of Commonwealth workplace laws appears to be deliberate

- the nature and reliability of information available to support a finding or view that a breach has occurred
- confidentiality (where the employee has requested our assistance, but does not want to tell us the business the issue relates to)
- whether the parties have made reasonable attempts to resolve the matter
- in the case of alleged breaches of monetary entitlements, the amount of any underpayment
- whether there has been a failure to provide minimum entitlements as opposed to a failure to provide conditions above minimum award entitlements (we give priority to minimum entitlements, that is, entitlements set out in the FW Act, a Modern Award or Enterprise Agreement)
- whether the employment relationship is ongoing, or how long ago the employment ended (the age of the matter may be relevant to whether we take action).

3.3 Action the FWO is likely to take

Where a request for assistance concerns wages or conditions, and there is a willingness to address the issue, we help the parties resolve the issue quickly and informally.

In most cases, we have found that the issue can be resolved by the parties with some help from us. We want parties to resolve these matters with minimal expense, time and stress. A formal investigation is generally not the best approach in these cases. Rather, we help the parties work through their issues together.

Where appropriate, this informal approach may include assisting the worker who is a party to a request to understand how Commonwealth workplace laws apply to their situation and how they may be able to resolve the issue with their employer.

Where this approach is not successful or appropriate, as an impartial agency, we may look to contact both parties to the request, understand each side's view and provide a range of advice and services in an effort to achieve a resolution.

Similarly, when we receive information from the community, we may record, review and use that information to design and deliver future education and compliance activities. Information from the community is an invaluable means of gaining a better understanding of an industry or market.

If it appears that deliberate or systemic non-compliance has occurred, we may carry out a formal investigation or inquiry.

A request for assistance about a workplace dispute usually results in us taking one or more of the following actions:

- using the information provided in future education and compliance activities
- giving tailored advice to help parties deal with the matter and get a better understanding of Commonwealth workplace laws
- helping people to resolve an issue quickly and informally in the workplace by providing access to employment tools and resources
- assisting an employee to take their own action (such as through a small claims court)
- referring the information to another government agency (such as the Australian Taxation Office) because it is relevant to their work or they are better positioned to take action
- conducting an inquiry
- offering mediation
- conducting an investigation
- placing parties on notice about our concerns and the possibility of future action if the conduct continues or happens again
- determining that there is no action required at this time.

In all cases the information given to us is important, and helps us to determine our current and future activities.

How the FWO intervenes

4.1 Early intervention

Most matters can be resolved through assisted dispute resolution services and our 'early intervention' approach.

The FWO receives a large number of requests for assistance from employees and employers who have a concern about their workplace. In these situations, we find if we get involved early, we can help the parties resolve issues at the workplace level. We encourage and empower employees and employers to resolve issues directly in their workplace where possible.

CASE STUDY – Early intervention

Jenny, a casual truck driver, approached the FWO for assistance because she thought she was not getting paid correctly. A FWO officer helped Jenny to work out her minimum pay rates under the relevant award. The FWO officer then helped Jenny to write a letter to her employer setting out her minimum pay rates, so that Jenny could explain that she believed had been underpaid and wanted this issue to be resolved. This is a first step often recommended by the FWO after getting a request for assistance like Jenny's.

Jenny shared the information with three other colleagues who also contacted the FWO to seek assistance. The FWO officer contacted the employer, providing advice about the relevant award provisions and assistance in using our online Pay and Conditions Tool to calculate the applicable shift rates for casual employees.

The employer didn't agree with the advice provided and said he would be seeking assistance from his accountant. The accountant contacted the FWO officer and confirmed that he had provided incorrect advice to his client, which led to the underpayments. After several conversations, the accountant and the employer engaged with the employees and resolved their concerns by calculating and back paying the underpayments and rectifying the minimum rates of pay via an agreed payment plan. The FWO officer showed the accountant other educational resources to assist in preventing issues in the future or with other clients, and advised the accountant to review any similar advice provided to other clients.

The FWO officer also encouraged the accountant to sign up to FWO's employer newsletter. The accountant and employer were listed as businesses to follow up in further FWO activities.

4.2 Mediation

Mediation is a free, simple, confidential and voluntary process conducted by an accredited impartial mediator.

Mediation gives parties the opportunity to discuss their workplace dispute with the help of an impartial mediator and find mutually acceptable solutions. Many requests for assistance we receive are suitable for mediation and most mediations lead to a resolution.

As a guide, mediation may be suitable where one or more of the following circumstances exists:

- there is a desire to preserve the existing employment relationship
- there is conflicting evidence (e.g. one person's word against that of another)
- there are issues about final entitlements (e.g. payment in lieu of notice and/or annual leave)
- the employer has withheld money or made deductions from wages
- there are allegations that an employee has taken property from their employer
- there is a classification dispute between employer and employee
- the employee and employer seek a quick solution to an issue.

Mediation is a practical process held over the telephone. It usually takes less than 90 minutes. The mediator takes a neutral stance while helping parties reach a settlement on the day of the mediation; the parties control the outcome. For more information visit the [mediation page](#) on our website (www.fairwork.gov.au/mediation).

CASE STUDY - Mediation

An apprentice came to the FWO requesting assistance. He advised he had not been paid penalty rates for work performed on weekends and that his third-year apprentice documents hadn't been completed.

The apprentice was engaged by the business when he was in the second and third year of his apprenticeship. Upon commencement, the employer advised he couldn't afford to pay weekend penalties. The apprentice agreed to work weekends at the ordinary rate of pay, knowing he would be paid less than the award, because he had found it difficult to find an employer willing to take him on.

The apprentice resigned and advised the business he was going to make a claim for underpayment of wages. In response, the business refused to sign off his apprenticeship paperwork, which resulted in the employee not being recognised as a tradesperson.

Given the issues in the dispute, a FWO mediation took place and a monetary settlement resulted. The employee had his apprenticeship signed off as part of the overall settlement. Throughout the process of dealing with the dispute through FWO, both parties received education about their respective workplace rights and obligations and were advised to take their respective rights and responsibilities seriously.

4.3 Tailored small claims assistance

Sometimes a request for assistance involving a workplace dispute is assessed by the FWO as suitable for an employee to seek their own recovery of unpaid entitlements through purpose-built small claims courts.

Small claims applications have low fees and are dealt with in a less formal manner than other courts. The small claims process is a fast and efficient way of resolving certain types of workplace disputes and helps both parties resolve the issue, not just the person who filed the small claim.

When deciding whether to recommend the small claims process to an employee, we consider:

- the amount of money being claimed
- the seriousness of the allegations
- whether the money being claimed is related to a common law contract or an above award payment
- whether attempts at voluntary recovery (such as mediation) have been made
- whether evidence is being disputed or there are written records
- the employee's ability to follow the small claims process
- whether the employment period ended more than two years ago.

When we suggest the small claims process, we assist both parties (employees and employers) by directing them to tools and resources that explain the small claims process and help them calculate minimum employment entitlements. These resources are available on our website at www.fairwork.gov.au/smallclaims.

In some cases, where we have found that an employee is owed money, we assist them through the small claims process, for example by helping with the small claims application. The level of assistance offered is considered on a case-by-case basis. For example, we may give greater help to a person with low literacy skills or someone from a culturally and linguistically diverse background.

CASE STUDY - Small claims

The FWO conducted an investigation into an employee's claim of non-payment of overtime. The investigation resulted in a Fair Work Inspector issuing a findings letter, which advised that the employer should rectify the overtime underpayment, calculated to be \$2500.

The employer disputed the investigation findings based on his view that his employee, Prasad, was not directed to work the overtime hours, despite Prasad's timesheets being signed by his supervisor. There was conflicting evidence as to the supervisor's intent and the amount of money in dispute, so we recommended that a small claims process would be the best way to resolve the dispute.

Prasad used our free online small claims resources such as 'A step by step guide to applying for small claims' and videos to learn more about the small claims process.

He also asked for the FWO's assistance in commencing the small claims application. We helped him write a pre-claim letter to his employer stating his intention to file a matter in a small claims court. We also provided information about lodgement options - including which courts he could lodge with, how to complete the forms, how to present his written evidence (such as diary records and text messages), and how to file the court papers.

We also offered assistance to Prasad's employer, Brad, on how to defend a small claims application through our online small claims resources and a discussion of his options.

We encouraged Prasad and Brad to try and resolve the issues to avoid the court process. We also explained to both parties that they may be required to give verbal evidence in court about whether Prasad was directed to work extra hours.

The matter proceeded to a court hearing where both parties represented themselves without lawyers present, and gave documentary and testimonial evidence. The parties also cross-examined each other. The judge found Prasad's evidence to be more persuasive and ordered Brad to pay Prasad \$2500 within 30 days.

4.4 Investigations

One of the FWO's main roles is to promote compliance with Commonwealth workplace laws. Our compliance priorities are based on our intelligence and experience as well as stakeholder input.

Our investigations and inquiries are important ways we obtain evidence of non-compliance. We assess the seriousness of non-compliance by the potential impact it has on an individual, group or market. We may decide to conduct an investigation or inquiry where the available evidence suggests one or more of the following exists:

- exploitation of vulnerable workers (e.g. aged, young, overseas)
- concerns presenting within a high-risk sector
- significant public interest
- deliberate disregard for the law, or an order of a court or tribunal
- such widespread non-compliance that its impact is to distort a part of the labour market, disadvantaging compliant businesses (e.g. large-scale non-compliance that undermines a level playing field, supply chains and networks that distance the beneficiary of the labour from those directly engaging the workers)
- an opportunity to provide an educative or deterrent effect.

CASE STUDY – Promoting compliance

Lina spent the last five years building her business. In this time, she opened a number of cafes in Melbourne. Her rapid growth increased her business from two outlets in the inner east of Melbourne to running 15 sites in greater Melbourne. In the last two years, the FWO received information from a range of sources (members of the public, former and current workers, and community groups) that employees were not receiving their minimum entitlements. While a steady stream of information has been received, less than 10 formal requests for assistance had been submitted. Many of the workers at Lina's cafes appeared to be international students, reluctant to approach the FWO.

After reviewing the information and intelligence, the FWO decided to audit seven of Lina's sites without notice. When the FWO undertakes an activity like this, Fair Work Inspectors interview workers at the sites (with the aid of interpreters if needed) and evidence is obtained using the powers available to the FWO under the FW Act. The activity also involved interviewing Lina, her senior managers and her accountant. At the end of the compliance activity, the FWO published a report on the FWO's website about what the FWO discovered and any further action taken as a result of the activity.

In circumstances which involve serious non-compliance we may conduct an investigation.

An investigation is where a Fair Work Inspector considers allegations and gathers and examines evidence to determine if there have been breaches of Commonwealth workplace laws.

All investigations are impartial. We do not represent any party. The Fair Work Inspector will rely on the evidence available when making a decision.

During an investigation, we will always provide each party the opportunity to be heard. We also use discretion to decide on the best process or reach the best outcome for an investigation.

In an investigation, a Fair Work Inspector can use powers under the FW Act to visit workplaces, interview people and require records or documents to be provided.

1. Section 712A Notices

Where Fair Work Inspectors have been unable to obtain evidence or information using voluntary or other methods, the Fair Work Ombudsman and specified Senior Executive officers have the power under section 712A of the Fair Work Act to apply to the Administrative Appeals Tribunal to issue a FWO Notice to require a person to provide information, produce documents or attend and answer questions.

These powers recognise that compliance with Commonwealth workplace laws is a critical factor in the cultivation of productive, cooperative and harmonious workplaces. Significant penalties apply for failure to comply with a FWO Notice.

The FWO will only consider requesting the AAT to issue a FWO Notice if we reasonably believe a person:

- can give information relevant to an investigation
- can produce documents relevant to an investigation
- is capable of answering questions relevant to an investigation
- all other evidence gathering means have been exhausted or are not appropriate.

If a person receives a FWO Notice, it means we consider that person is capable of assisting and providing material relevant to an investigation.

More detailed information about the different types of these Notices, including:

- when and how we exercise these powers
- how to respond
- the examination process
- your rights and obligations

is set out in our [Guide to FWO Notices](#).

2. Expectations

During all and any investigations, we expect all parties (and anyone else involved) to:

- always tell us the truth
- fully disclose all relevant matters from the outset of the investigation
- provide us with relevant information as it comes to hand
- respond in a timely manner to our requests.

Penalties may be imposed by a court if a person provides a Fair Work Inspector with false information or hinders or obstructs an Inspector. In very serious cases, the FWO may refer such matters to the Commonwealth Director of Public Prosecutions for criminal prosecution.

The Fair Work Inspector handling the investigation will update the parties with developments at regular intervals.

The Fair Work Inspector will advise the parties in writing of investigation findings and include details of how the outcome was decided. The findings will be provided within seven working days of the Fair Work Inspector's decision.

We seek to be reasonable and proportionate when conducting investigations. The average duration of an investigation is four months.

CASE STUDY – Investigation

Ishan's employees had taken unprotected industrial action and he was successful in obtaining an order from the Fair Work Commission that required the employees to return to work. The industrial action had caused his business significant economic loss.

The FWO was told that Ishan had paid his employees during the unprotected industrial action. This is not allowed under the FW Act, so we initiated an investigation.

Fair Work Inspectors issued Ishan with a Notice to Produce documents to adequately assess whether breaches of the FW Act had occurred and provide Fair Work Inspectors with evidence about whether payments had been made to employees. The investigation process also involved various steps including assessing information and records, and speaking with the employer and staff at the business.

Ishan told Fair Work Inspectors that because of the nature of the industrial action, it was hard for him to tell which employees had participated. The FWO found that Ishan's business had a history of responding to industrial action by requesting certain orders from the Fair Work Commission, but that the business itself did not have proper processes and systems in place to identify the people who took part in unprotected industrial action.

The FWO could see that Ishan's business was trying to respond appropriately to industrial action because of the cost of the stoppages to the business. It also wanted to ensure the business would not breach the law in the future.

Ishan formally agreed to introduce processes and systems to manage compliance with industrial action obligations, so that he would comply with the FW Act in future. The FWO was satisfied that Ishan was taking proactive measures to redress the breaches. If similar allegations against this business presented in the future, the FWO would take into consideration the outcomes of this investigation.

4.5 Proactive compliance campaigns

Campaigns help us check, improve and ensure ongoing compliance with Commonwealth workplace laws in a targeted way.

Campaigns are designed to test an employer's awareness of and compliance with Commonwealth workplace laws, willingness to respond to issues of concern, and commitment to future compliance.

Using intelligence and data received from the public as well as that acquired by Fair Work Inspectors, we identify issues and trends in industry sectors or regions that suggest we need to take a closer look to ensure compliance.

An important part of our campaigns is working with groups such as industry associations, employer representatives, unions and community groups so that we can tailor our campaigns to ensure the greatest impact and benefit to the community.

During a campaign, we explain the purposes of our monitoring activity to employers and employees through letters, phone calls, visits from our Fair Work Inspectors, social media, and our website.

By checking employee time and wage records, we are able to identify any issues of concern and begin working with the businesses to fix any problems.

Often we will recommend systems that could be put in place to ensure ongoing compliance. We may test future compliance by re-visiting these businesses and assessing whether our assistance had a positive impact and led to behavioural change. While our focus in a campaign is to educate and assist, we will take appropriate and proportionate enforcement action where we find employers have intentionally breached their obligations or have failed to make appropriate efforts to ensure ongoing compliance after interacting with us.

Following each campaign, we release a report outlining the findings and detail any particular insights or trends as well as planned future activities. These reports are published on our website.

CASE STUDY - Campaign

After analysing information and intelligence we had received from customers as well as previous compliance activities, the FWO became concerned about non-compliance in a number of restaurant businesses located in an inner suburb of Sydney. The area was known for 'cheap eats', with a large university nearby doubling as both a customer base and a pool of young workers (many of them visa holders).

The FWO designed a campaign to test compliance in most restaurants in the area. A team of Fair Work Inspectors visited businesses in the area over two days, speaking with employers and employees in around 100 businesses, gathering information, evidence and testing the intelligence we had received.

In monitoring the businesses, Fair Work Inspectors audited the pay rates and record-keeping practices in each business and provided advice to help employers achieve or maintain compliance. Where employers were not paying staff correctly, Inspectors ensured that they corrected their practices and back paid employees, using Compliance Notices, where appropriate. Where employers were not meeting their pay slip and record-keeping obligations, Inspectors considered each case and issued Infringement Notices, where appropriate. Where there was significant non-compliance, the FWO commenced investigations and undertook an assessment as to whether stronger enforcement action was required.

The campaign provided a useful insight into the issues facing employees and employers in this industry. The FWO's concerns regarding the area were validated in the findings, and the activity provided further intelligence and data to inform future activities in this sector.

4.6 Proactive Inquiries

There are two types of inquiries at the FWO:

3. Inquiries

Sometimes we receive information from the media or the community which suggests non-compliance. We often decide to inquire initially into the matter rather than commence an investigation. In doing so, we encourage all parties involved to speak with us and provide information that supports their point of view. Our focus is on helping the parties, where possible, to comply with the law and resolve the matter quickly and informally.

During such an inquiry, we may ask parties to provide evidence such as time and wage records, or other documents. Where an inquiry identifies suspected deliberate or repeated breaches of Commonwealth workplace laws, the matter will be referred for investigation. Where evidence is disputed, parties may be encouraged to resolve the matter through a small claims process.

4. Comprehensive inquiries

In other situations, where we believe that the information we have received from the media or community warrants detailed research, we may decide to conduct a comprehensive inquiry. This type of inquiry reviews allegations of serious non-compliance with Commonwealth workplace laws by looking at information about what has happened or is happening in a particular industry, sector, supply chain or service network.

This form of inquiry is a more in-depth compliance activity, which enables us to better understand the working environment, business relationships and market conditions so that we can coordinate our approach to ensure we both identify and address any factors causing the non-compliance.

After we have conducted the various compliance activities involved in an inquiry, it is not uncommon for enforcement action to commence against a number of parties involved in the review. We use the findings of the inquiry to assist us to decide what needs to be done next to ensure future compliance. To promote deterrence, we publish the findings from this type of large-scale and thorough inquiry on our website.

CASE STUDY – Inquiry

The FWO launched an in-depth Inquiry into the cleaning services procured by 4 and 5 star Hotels following a significant increase in the number of requests for assistance received from hotel housekeepers alleging they were employees, not independent contractors.

Applying a holistic ‘multi factor’ test, the Inquiry examined a sample of contract cleaning companies engaged by 4 and 5 star Hotels to assess whether the workers were classified correctly as either employees or independent contractors.

The Inquiry included unannounced visits by Fair Work Inspectors to several major hotels, interviewing housekeepers, issuing Notices to Produce documents on various businesses in the labour supply chain, assessing contracts and interviewing procurement managers.

At two of the hotel groups, the Inquiry found evidence indicating the housekeepers had been misclassified as independent contractors when they were in fact employees. The cleaners were predominantly international students on visas working solely for a particular hotel with no autonomy in their day-to-day work. They were receiving a flat rate of pay and having to pay for the cost of chemicals, uniforms and administration fees. Consequently, these workers were denied applicable penalty rates, regular patterns of work and leave entitlements available to employees under the FW Act.

In our Findings Report, we recommended a range of compliance and enforcement outcomes against the respective hotel brands. In the case of one hotel group, our intervention through an Enforceable Undertaking resulted in the repayment of nearly \$2 million to housekeepers.

The report also recommended steps on how the hotel sector can improve compliance through better management of their procurement practices, ensuring principal contractors and sub-contractors comply with the law. These recommendations included actions the FWO will take in collaboration with relevant businesses and industry organisations.

The range of outcomes

5.1 Compliance outcomes with FWO

Due to the spectrum of issues dealt with at the FWO, we use a range of tools based on the individual circumstances of the matter to encourage compliance. Our compliance tools increase in seriousness and penalty depending on the risks to the community and the need for compliance. The tools we employ are outlined below.

1. Findings letter

A findings letter is sent to the parties at the end of an investigation. It sets out what we found from the evidence gathered and it tells each party what they need to do next, and what actions (if any) we intend to take.

For instance, we may find there was no evidence or insufficient evidence of any breaches. At other times, we may find breaches and will ask the party to fix these (e.g. by back paying an employee).

CASE STUDY – Findings letter

Pauline, a part-time employee, had worked for a coffee shop for over 12-months. Pauline asked us for help because she received less than the award pay rate and was not paid more for working on the weekend.

A Fair Work Inspector investigated the matter, gathering evidence including documents and statements from Pauline, her employer Chris, and a witness. The Fair Work Inspector assessed the evidence and found a number of breaches. The Fair Work Inspector sent a findings letter to Chris and Pauline.

The findings letter detailed the award obligations for minimum pay rates as well as the penalty rates applicable for weekend and evening work. The findings letter also explained the website tools that could help Chris to pay staff correctly and outlined that Chris needed to back pay Pauline \$850 to rectify the underpayment. If Chris ignored the findings letter, the FWO would seek to take further compliance action.

2. Formal caution

A formal caution is a written warning given to a party when we have found breaches and are putting them on notice that future breaches could result in us pursuing enforcement action.

A formal caution is typically used to make it clear to a party that its future activities will be closely monitored.

In the future, if further non-compliance is identified, the fact that the party was previously issued with a formal caution is a factor we will consider in deciding whether it is in the public interest to commence civil proceedings in respect of those further breaches, and if so, whether to apply to the court for a serious contravention.

CASE STUDY – Formal caution

Peng worked in sales for five months but did not receive a regular income during that time. Peng worked on commission and told the FWO that he received on average less than \$10 per hour over that time.

Peng's employer, Bertrand was initially hostile with the FWO officers who contacted him to let him know that a request for assistance had been received by the agency. The FWO commenced an investigation.

During the investigation, Bertrand confirmed that Peng only deserved to be paid when he made sales. The FWO explained to Bertrand that he had breached both the award and the FW Act, and failed to provide many of Peng's entitlements including wages, allowances and annual leave.

The employer disputed the findings. After several meetings at the FWO's offices with his accountant, the employer agreed to pay the entitlements owing to Peng. Due to the significant breaches, the FWO gave Bertrand a formal caution, advising him that if the FWO identified further non-compliance in the future, the formal caution would be a factor we would consider in deciding whether to initiate litigation or take other enforcement action against him.

3. Compliance partnerships

The FWO is keen to identify and work with major employers, brand owners and holding companies that want to build a culture of compliance in their workplaces by entering into formal compliance partnerships with us.

Formal compliance partnerships give employers, brand owners, holding companies, and importantly their staff, greater confidence that their systems and processes are working effectively and are helping to promote compliance.

Their public commitment to compliance is also a competitive advantage that helps attract talent, instil confidence in customers and appeal to organisations in their supply chain or service network. For example, compliance partnerships provide an opportunity for franchise operators and head contractors to work with franchisees and sub-contractors to drive workplace improvements throughout their supply chain or service network.

Compliance partnerships may take different forms depending upon the scale and maturity of the business. It is usual for compliance partnerships to contain the following expectations:

- self-audits (including third-party validations)
- the monitoring of contractors and franchisees
- effective dispute resolution processes
- regular and frequent workplace relations training for key managers and staff.

Compliance partnerships provide businesses with an opportunity to work closely with the FWO to ensure compliance with Commonwealth workplace laws is sustainable. The FWO offers participating businesses support, advice and assistance that promotes compliance.

To ensure transparency and accountability, and in order to inform greater awareness of workplace rights and obligations, the FWO publishes reports on the status and outcomes of all its compliance partnerships. Names of enterprises, entities or brands that have entered into a compliance partnership with the FWO can be found on our website: www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/proactive-compliance-deeds

CASE STUDY – Compliance partnership

Franchisor Pty Ltd had implemented a number of measures to improve compliance across its network, including introducing better systems and processes to assist franchisees. They approached the FWO to enter a formal compliance partnership to further enhance this work and to demonstrate its commitment to its franchisees, workers and customers.

Meeting with Franchisor Pty Ltd, we discussed a number of options that would promote compliance throughout its network and meet the specific business needs of the franchise, such as:

- committing more resources to a worker enquiry line available to both direct employees and employees of franchisees
- enhancing its business systems and processes to enable greater visibility of franchisee activity
- conducting self-audits of employee entitlements of direct employees
- facilitating self-audits of employee entitlements of a sample group of franchisees
- resolving requests for assistance received by us in the first instance and then reporting the outcome to us within a certain time period
- reporting annually on the status of the outcomes of the compliance partnership.

Having secured agreement on the terms of the partnership, a Proactive Compliance Deed was jointly signed by Franchisor Pty Ltd and the FWO, and the Partnership was publicly announced.

After six months, Franchisor Pty Ltd and its franchisees reported to us that they were finding it much easier to comply with their workplace obligations because of the compliance partnership, and were pleased with the positive impact it had had on their staff and the brand's image with their customers.

5.2 Enforcement outcomes under the FW Act

An enforcement outcome is where we decide that formal action under the FW Act is the appropriate response to breaches we have found.

There are four enforcement outcomes available to us. The FW Act sets out the legal requirements for each enforcement outcome, as well as time limits and the courts' powers to make orders and impose financial penalties.

1. Infringement Notice

An Infringement Notice is a fine given for breaching the record-keeping or pay slip requirements of the FW Act and the Regulations.

The FWO may issue Infringement Notices up to 12 months after the breach occurred.

We have discretion over whether to issue an Infringement Notice or not, and what amount the fine should be (up to the legal maximum). We consider these factors in determining the amount of the fine:

- whether the breach obstructs a Fair Work Inspector's ability to find or calculate underpayments
- whether the breach meant that an employee did not have the information needed to recover entitlements
- whether the employer has a history of breaching time and wage record-keeping or pay slip requirements
- the number of people affected by the breach
- whether the breach was deliberate to avoid obligations under workplace laws
- whether the breach resulted in other significant consequences, for example an employee being unable to secure a loan due to lack of pay records.

Currently the maximum fines available under an Infringement Notice for each breach of a record-keeping or pay slip obligation are:

- \$1260 for an individual or \$6300 for a body corporate for breaches of the FW Act
- \$420 for an individual or \$2100 for a body corporate for breaches of the Regulations.

If an employer has been issued an Infringement Notice, but thinks a mistake has occurred and they have not breached record-keeping or pay slip obligations, the person can make an application to us to have the Infringement Notice reconsidered and withdrawn.

CASE STUDY - Infringement Notice

Valentina worked for a company as a full-time administrative assistant. She was concerned that her pay had not increased after she turned 18. She thought she was still being paid the 17-year old rate, but she could not be sure as her employer Karl had not given her pay slips for seven months. She also worked some overtime, but was not always paid for this.

Valentina sought our assistance, and we found that Karl had not paid Valentina the correct entitlements. Karl paid Valentina the money owing and agreed he had overlooked her award increase when she turned 18.

We gave Karl's company two Infringement Notices for \$2100 each (one third of the maximum amount). This amount was settled on because Karl did not have a history of non-compliance. The first Infringement Notice was because Karl failed to keep proper records of Valentina's overtime hours, which may have caused Valentina to miss out on some entitlements. The second Infringement Notice was for failing to give Valentina pay slips, which meant she could not be sure of the gross wages or overtime paid to her each week.

These breaches of the FW Act by Karl's company resulted in total fines of \$4200 to be paid within 28 days. We also gave Karl information and templates to help him comply with his pay slip and record-keeping obligations in the future.

As Karl now understands his obligations under Commonwealth workplace laws, the FWO would consider a more serious intervention should Karl breach these provisions again.

2. Compliance Notice

A Compliance Notice is a legally-binding written notice that requires a person to do certain things to fix breaches of the FW Act.

A Compliance Notice can be used where a Fair Work Inspector reasonably believes that a person has breached a term of the National Employment Standards, a modern award, enterprise agreement or other instrument that specifies wage rates and entitlements.

We typically issue Compliance Notices where an employer has either not agreed to, or we reasonably suspect the employer will not, rectify an alleged breach. A person who has received a Compliance Notice may seek a review through the courts.

The decision to issue a Compliance Notice is not taken lightly, as a person's failure to do what the Compliance Notice requires in the time stated may result in us deciding to start legal proceedings against them. We can take action for both the original breaches and the failure to comply with the Compliance Notice. A failure to comply can result in significant financial penalties of up to \$31 500 for a company and \$6300 for an individual.

When considering whether to issue a Compliance Notice, a Fair Work Inspector will consider:

- the nature and extent of the breaches
- the level of cooperation from the employer
- whether the Compliance Notice will achieve a better and/or faster outcome such as to bring about a cost effective and quick resolution to recover underpayments owed to individuals.

CASE STUDY - Compliance Notice

A Fair Work Inspector investigated a matter involving Moshe, a 19-year-old working in a childcare centre. The investigation found that the employer, Kids R Us, had underpaid Moshe \$2300 in wages over a six-month period and failed to pay annual leave on termination.

Stella, the sole director of Kids R Us, told the Inspector that she would not back pay this amount, as Moshe had not been a hard worker and she did not deserve any more money. The Inspector advised Stella that Kids R Us was legally required to make the payment. Further, the Inspector explained that issues with Moshe's performance needed to be addressed during her employment and were not a reason to pay less than the legal minimum rate of pay. Kids R Us still refused to pay the money owing.

The Inspector issued a Compliance Notice to Kids R Us which outlined the requirement to make the payment within a set timeframe. The Fair Work Inspector advised Stella that if Kids R Us did not make the payment by the due date, it might face penalties in a court.

Kids R Us didn't pay the amount by the due date and continued to refuse to make the payment. The FWO brought proceedings against Kids R Us, alleging failure to comply with the Compliance Notice.

The court found that Kids R Us had failed to comply with the Compliance Notice and imposed a penalty of \$26 500; well in excess of the underpayment to Moshe.

3. Enforceable Undertaking

When we reasonably believe that someone has breached the FW Act, the breach is serious and the person acknowledges this, accepts responsibility and agrees to fix the harm, we can accept a written undertaking from the person.

Enforceable Undertakings are made in a legally binding document, which is published on our website. Importantly, if the terms of an Enforceable Undertaking are not complied with, we can take legal action in a court to enforce them, as well as seek other orders the court considers appropriate.

The key difference between an Enforceable Undertaking and a Compliance Notice is that an Enforceable Undertaking involves not only the payment of all monies owed to workers (for instance), but also admission of wrongdoing and demonstration of contrition from the party who has breached the law. In addition, an Enforceable Undertaking covers a broader range of conduct and broader remedies.

Enforceable Undertakings typically operate for a period of between two to five years and often include terms about fixing loss or damage caused (e.g. by paying compensation or back pay to employees). They are also 'forward looking' and deal with future compliance and what the person will do in the future to prevent more breaches, such as workplace law training sessions for senior managers. Enforceable Undertakings often require people to report to FWO on their compliance at specific times or when a particular action is undertaken (such as when they complete a self-audit).

We may offer a person the option to enter into an Enforceable Undertaking as an alternative to us starting legal proceedings. We also consider offering Enforceable Undertakings to persons who have approached us with admissions that they have breached the law and are committed to 'righting the wrongs' of the past.

When deciding whether to enter into an Enforceable Undertaking, we consider:

- the nature, extent and seriousness of the breaches
- the prior compliance history of the person
- whether the person admits the breaches and what they propose to do to fix or prevent further breaches, beyond simply committing to comply with minimum standards in the future
- the attitude of the party (e.g. whether they are cooperative)
- whether the undertakings are relevant to the breaches and will achieve positive outcomes for employees and/or the community
- whether a Compliance Notice would be better suited to the circumstances (if, for instance, it is suspected the party is not genuine about changing their behaviour)

- whether an undertaking would be a superior outcome compared to litigation in the circumstances, including whether it brings specific and general deterrence and promotes compliance with the FW Act. As an example, the broad range of remedies available under an Enforceable Undertaking could result in a broader range of outcomes including back payment to affected workers, a public apology, ongoing training, development and auditing, a monetary donation to an organisation, etc. These remedies can occur within shorter timeframes than can be anticipated throughout court processes, keeping the costs lower for all concerned, while bringing about specific and general deterrence.

CASE STUDY - Enforceable Undertaking

In running his business, Ricardo had ignored the pay rate increases in the last three annual wage reviews and consequently underpaid his employees a total of \$70 000. Ricardo had also failed to pay a number of allowances and other entitlements to his workers.

During the course of the investigation, Ricardo's staff advised the FWO that the business appeared to be facing some financial pressures. Ricardo explained that he had tried to resolve these matters, but that his cash-flow issues had contributed to the wage underpayments. He had been open with his staff about the financial problems and was apologetic about his inability to pay his staff their minimum entitlements.

In consideration of the severity of the underpayments, the FWO decided to enter into an Enforceable Undertaking with Ricardo, who had no compliance history with the FWO and was willing to rectify the breaches identified and back pay staff. The Enforceable Undertaking included:

- making full back payments to all employees involved
- apologising to his employees as well as issuing a public apology
- setting up a My account on fairwork.gov.au to ensure he was alerted to all future wage rises and implemented them
- undertaking a third-party approved self-audit for a three-week period each August for three years to prove annual wage reviews had been observed and that the workers were receiving their correct entitlements
- delivering workplace relations training to all managers and team leaders.

Ricardo's actions were made public on our website through the terms of the Enforceable Undertaking. The outcomes provided an array of proactive measures and allowed back payment to be made to underpaid staff quickly and without the need for a lengthy court process.

4. Litigation

In the most serious instances of non-compliance, we take cases to court to enforce the law or seek a penalty. We call these court cases litigations.

Detailed information about how we make decisions to start litigation is set out in our [Litigation Policy](#).

Publicising compliance and enforcement

As set out in our [Media policy](#), we publish information regarding our compliance activities and enforcement outcomes on our website. This forms an important part of our role in ensuring compliance with Commonwealth workplace laws by:

- enhancing general and specific deterrence
- informing and educating the community, or people in the same and similar industries, of the nature and outcome of enforcement activities.

Information we publish will be fair, accurate and timely. We may decide to publish information on our website, by media statements or through social media interventions. Our information is often contained in reports, presentations or other educative material which we promote in order to raise awareness of the importance of understanding and complying with Commonwealth workplace laws.

In deciding whether to comment publicly on compliance activities and in what form, we consider a range of factors such as the nature of the matter, who the statement is likely to impact and how it furthers the FWO's objectives.

At all times we:

- consider the likely and possible risk and consequences of making or not making a public comment
- weigh up the public interest, deterrence and risks associated with both making or not making a statement.

Any public comment regarding compliance activities that are underway are carefully made to protect the integrity of the compliance activity. Where the FWO does confirm the existence of a compliance activity, it does not mean that an adverse finding will be necessarily made.

In litigation matters, the FWO may publicise the decision to commence proceedings, the lodgement of court documents, milestones during proceedings, directions hearings, and/or decisions (whether there are financial penalties, other orders or neither).

We will publish information if we believe that publicising any or all of these stages will support compliance with Commonwealth workplace laws.

The FWO publishes this information for two reasons:

- visibility of our enforcement activity sends a powerful message of deterrence to others and promotes compliance, and
- clarification of the law and the level of penalties that certain breaches can incur may help people understand the seriousness of breaking the law.

Working with other government regulators

The FWO is not always the agency best placed to deal with an issue. For example, a number of authorities specialise in handling superannuation, health and safety, unfair dismissal, visa issues and bullying.

We want to help our customers and so where we believe another agency can provide greater assistance, we will refer the issue as early as possible.

We may share information with other government agencies or departments where authorised by the FW Act. For example, we may share information where disclosure is necessary, appropriate, or likely to assist administration or enforcement of a law of the Commonwealth, a State or a Territory.

Examples of agencies we may share information and work with on various activities include the Australian Building and Construction Commission, the Australian Competition and Consumer Commission, Australian Securities and Investments Commission, the Australian Taxation Office and the Department of Home Affairs.

In addition to receiving information from these government agencies at times, which assists us to do our work, we participate in joint education and compliance activities to monitor and influence compliance through different laws.

Feedback

We encourage feedback about your experience with us and invite people to contact us at www.fairwork.gov.au/feedback.

If a person requests a review of our actions and is not satisfied with the result of our review, they can contact the Commonwealth Ombudsman on 1300 362 072, or at www.ombudsman.gov.au.