



**Fair Work**  
OMBUDSMAN

# **Compliance and Enforcement Policy**



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### **Acknowledgement of Country**

The Fair Work Ombudsman (FWO) acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies, and community. We pay our respects to them, their cultures, and Elders past, present, and future.

### **About our artwork: Stepping forward**

Stepping forward represents taking the next step on the journey towards reconciliation and the potential possible when everyone is included.

Connecting with diverse peoples; meeting, listening and sharing together, can build respect and trust. Working in concert for a common purpose and united in the mission to make meaningful change.

It serves as a reminder of the dynamism and vibrancy of First Nations peoples and the lands from which they come, making the emergence of new ideas and ways of being possible that enables the envisioning of a brighter future.

Artist: Timothy Buckley

## Purpose

The Compliance and Enforcement Policy (Policy) provides information about how the Fair Work Ombudsman (FWO) fulfils its statutory compliance and enforcement functions under the *Fair Work Act 2009* (Cth) (FW Act). This Policy sets out the factors we consider when using our compliance and enforcement powers.

The FWO is established under section 681 of the FW Act. The FWO's statutory functions are set out in section 682 of the FW Act. These functions include:

- ▶ promoting harmonious, productive and cooperative workplace relations and compliance with the FW Act and fair work instruments – including through the provision of education, assistance and advice
- ▶ monitoring compliance with the FW Act and fair work instruments
- ▶ inquiring into, and investigating, any conduct or practice that may be contrary to the FW Act, a related offence, a fair work instrument or a safety net contractual entitlement
- ▶ commencing proceedings in a court, or making an application to the Fair Work Commission, to enforce the FW Act, a fair work instrument, or a safety net contractual entitlement
- ▶ publishing this Policy, which includes guidelines on circumstances relevant to enforceable undertakings and cooperation agreements
- ▶ referring matters to other relevant authorities where appropriate
- ▶ representing employees, regulated workers or outworkers in certain circumstances.

Find out more about the Fair Work Ombudsman at [About us](https://www.fairwork.gov.au/about-us).<sup>1</sup>

## Policy scope

This Policy applies to our compliance and enforcement functions and describes how we fulfil our role as the workplace regulator. This includes how we use information to make decisions based on the following strategic enforcement principles:

- ✔ prioritisation
- ✔ deterrence
- ✔ sustainability
- ✔ system-wide effect.

In exercising our approach to compliance and enforcement, the FWO recognises the importance of working closely with Commonwealth and state regulators, employer groups, unions, and alternative services<sup>2</sup> to provide education and advice, and to promote multi-stakeholder mechanisms that support compliance.

In consultation with stakeholders, the FWO reviews its priority areas of regulation. Find out more at [Our priorities](#).<sup>3</sup> These are areas that are at significant risk of, or that demonstrate a history of, systemic non-compliance, where we seek to make sector-wide impacts through increased attention. They include an enduring commitment to prioritising education and assistance for small business employers and employees, and vulnerable or at-risk workers.

Our priorities assist the FWO to make decisions about our resource allocation and are a consideration when responding to requests for assistance involving a workplace dispute.

This Policy does not prescribe how the FWO's functions or powers are operationalised and should be read alongside our published [Corporate Plan](#).<sup>4</sup>

1 <https://www.fairwork.gov.au/about-us>

2 Alternative services include, but are not limited to, community justice centres, legal aid facilities, worker advocates, small claims courts and tribunals

3 <https://www.fairwork.gov.au/about-us/our-role-and-purpose/our-priorities>

4 <https://www.fairwork.gov.au/about-us/our-role-and-purpose/our-priorities/corporate-plan>

# Governing principles

The following principles inform our approach to compliance and enforcement:

<b>Accessible</b>	<p>We ensure the advice and assistance that we provide is clear, accessible and practical. The tools and resources we provide empower workers and other duty holders<sup>5</sup> to understand and comply with workplace laws.</p> <p>We receive information through:</p> <ul style="list-style-type: none"> <li>▶ enquiries about wages, entitlements and workplace protections</li> <li>▶ requests for assistance involving a workplace dispute</li> <li>▶ publicly available material</li> <li>▶ anonymous reports</li> <li>▶ stakeholder feedback</li> <li>▶ intelligence</li> <li>▶ investigations.</li> </ul>
<b>Accountable</b>	<p>We act impartially and avoid or otherwise manage conflicts of interest when performing our functions.</p> <p>As an Australian Government regulator, we ensure our investigation practice conforms with the Australian Government Investigations Standards.<sup>6</sup></p> <p>We regularly and publicly communicate our compliance and enforcement outcomes.<sup>7</sup></p>
<b>Consistent</b>	<p>Our decision-making is guided by our principles and positions, and by precedents and decision-making from courts and tribunals on the application and interpretation of Australia's workplace relations laws.</p> <p>Our compliance and enforcement approach is designed to promote duty holders' understanding of, and compliance with, their legal obligations.</p>
<b>Reasonable</b>	<p>Our determinations and actions are evidence-based, proportionate and honour the principles of natural justice and due process.</p> <p>We will conduct litigation honestly, fairly, consistently and in accordance with the Commonwealth's obligation to act as a model litigant.</p>
<b>Risk-based and data driven</b>	<p>We consistently source information to identify, monitor and address emerging and systemic non-compliance.</p> <p>We monitor our priority areas while staying responsive to emerging issues. Our priorities provide a framework through which we make decisions about our resource allocation.</p> <p>The information we receive is prioritised and risk-assessed to inform an evidence-based approach to compliance and enforcement.</p>
<b>Strategic</b>	<p>In taking compliance and enforcement action, we consider the entire national workplace relations system by seeking to deter non-compliance, change unlawful behaviours and achieve sustainable compliance. Such a strategy is designed to maximise impact by identifying and addressing the drivers of non-compliance.</p>

<sup>5</sup> For the purposes of this Policy, a duty holder is defined as a person, natural or corporate, that has an obligation under the FW Act to either do or not do a particular action. A duty holder includes (but is not limited to): employing entities, registered organisations, company directors, company secretaries, officials of organisations, managers, accountants, bookkeepers, external human resources consultants, companies and people involved in supply chains involving the procurement of labour, persons involved in industrial action, a holding company of a subsidiary employing entity or its directors, franchisors, and workers

<sup>6</sup> <https://www.ag.gov.au/integrity/publications/australian-government-investigations-standards>

<sup>7</sup> Any publication of outcomes, including (but not limited to) the common publishing of media statements for FWO's litigations, is done in accordance with our Privacy Policy, Information Access Policy and Media Policy which are available on our website at [www.fairwork.gov.au](http://www.fairwork.gov.au)



## Key regulatory approaches

The FWO adopts key regulatory approaches to fulfil our statutory compliance and enforcement functions under the FW Act, as outlined below.

### Independent and impartial regulation

The FWO is an independent and impartial regulator committed to promoting harmonious, productive and cooperative workplace relations and ensuring compliant workplaces.

The FWO is not an advocate or representative body. We have several functions, including monitoring workplaces for compliance and inquiring into, investigating or commencing proceedings, or making applications in relation to suspected contraventions and referring matters to relevant authorities where appropriate. We may refer matters to other authorities as appropriate or represent employees, regulated workers or outworkers in certain circumstances.<sup>8</sup>

We apply a graduated approach based on strategic enforcement principles and only use enforcement when other cooperative approaches have failed or are inappropriate.

The FWO is supported by staff who assist with the performance of workplace compliance and advisory functions. Our staff conduct their roles in accordance with the APS Values<sup>9</sup> and APS Code of Conduct.<sup>10</sup>

The FWO appoints Fair Work Inspectors who are empowered to investigate and enforce compliance with Australia's national workplace relations laws. All Fair Work Inspectors are of 'good character' as required by the FW Act.<sup>11</sup>

### Advancing tripartism (working collaboratively with key stakeholders)

In accordance with our Statement of Intent,<sup>12</sup> we believe every part of the workplace relations system has an important role to play in creating a culture of compliance that fosters productive and inclusive workplaces that comply with workplace standards for Australian workers and promote compliance by duty holders.<sup>13</sup>

We can expand our reach when we work constructively with key stakeholders. Our collaborative activities with stakeholders are underpinned by consultation, respectful engagement and careful design to best optimise our approach to compliance and enforcement and ensure our independence and impartiality are not compromised.<sup>14</sup>

We collaborate with employer organisations, unions and key stakeholders to assist in ensuring workers and other duty holders understand their obligations and rights and are empowered to act. In regulating Australian workplaces, we appreciate that acting alone limits our reach.

Accordingly, we consider that employer organisations, unions, community justice centres, worker advocates, and small claims courts and tribunals also have important roles in education, deterrence and compliance – as well as providing a direct, (and at times), more appropriate, service for parties to address their workplace disputes.

<sup>8</sup> Section 682(1)(f) of the FW Act provides for the FWO to consider representing employees, regulated workers, or outworkers if it will promote compliance with the FW Act or a fair work instrument

<sup>9</sup> <https://www.apsc.gov.au/working-aps/information-aps-employment/aps-values>

<sup>10</sup> <https://www.apsc.gov.au/working-aps/integrity/integrity-resources/code-of-conduct>

<sup>11</sup> Section 700(2) of the FW Act

<sup>12</sup> <https://www.fairwork.gov.au/about-us/accountability/reporting-to-parliament/regulator-performance-framework>

<sup>13</sup> As outlined in the Jobs and Skills Summit's September 2022 outcomes, key stakeholders – including business groups, unions and government – agreed on the need to proactively work together to strengthen tripartism and constructive dialogue in Australian workplace relations to promote safe and secure jobs, and fair and productive workplaces

<sup>14</sup> The Labour Inspection Convention 1947 enshrines the impartiality of labour inspectors, while ensuring regulators make appropriate arrangements to promote effective cooperation across government, and collaboration with employers, workers, and their representative organisations



We are also committed to promoting voluntary industry-led, multi-stakeholder mechanisms that support compliance and allow the FWO to focus its compliance and enforcement activities to identify and address suspected non-compliance more effectively.

**The FWO's view is that sustainable change requires more than one-time interventions and the regulator acting alone. Our focus is on collaborating with employer and worker representatives to secure long-term solutions that facilitate sustainable compliance.**

**As we embed a more collaborative approach into our work, we are committed to acting in accordance with International Labour Organisation Conventions ratified by the Australian Government.**

## **Parallel regulation (working collaboratively with other regulators)**

We also acknowledge that another regulator may be better placed to deal with issues that arise in workplace disputes, and therefore we have entered into formal arrangements with Commonwealth and state regulators to assist our mission of promoting compliance. These arrangements involve sharing information and intelligence, joint education and compliance activities, and referring instances of non-compliance for their consideration and action.<sup>15</sup>

Where appropriate, we may conduct joint investigations with other regulators in relation to duty holders, syndicates or networks who are suspected of being engaged in unlawful behaviours, which may include, but not be limited to, suspected contraventions of the FW Act.

By maximising our collaborative focus with government and non-government stakeholders, we aim to enhance our impact through a shared and collective responsibility for ensuring compliance with all relevant workplace laws. Where the FWO becomes aware of allegations that are outside its statutory functions, the FWO will refer those allegations – or provide the information obtained – to the relevant bodies as appropriate.<sup>16</sup>

<sup>15</sup>For disclosure of information by the FWO, see Section 718(2) of the FW Act

<sup>16</sup>See FW Act s.682(1)(e) and s.718



## Using information to make decisions

In accordance with our governing principles we:

- ▶ carefully assess information to understand if, when, where and why non-compliance is occurring
- ▶ reassess the information, taking into account changes in the circumstances of a case, new information coming to light and evolutions in the broader operating environment
- ▶ determine the most appropriate response to ensure compliance and prevent future non-compliance.

In assessing information and making decisions about the management of a matter (which includes whether to undertake or continue an investigation), we exercise our regulatory discretion by considering and applying factors such as those outlined in the table below.

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### The allegations

- ▶ Are the allegations of non-compliance an isolated instance or part of a pattern of behaviour?
- ▶ Are the allegations reliable/credible? Can evidence be obtained to support the allegations?
- ▶ How significant are the allegations of non-compliance?
- ▶ If validated, what is the scale and impact of the alleged non-compliance on:
  - » workers and the workplace
  - » other businesses/workplaces
  - » relevant industry sectors
  - » geographic regions?
- ▶ When did the alleged non-compliance occur and over what period of time?
- ▶ Is the alleged non-compliance still occurring?
- ▶ Do the allegations impact current or past employees?
- ▶ Do the allegations indicate a system-wide non-compliance?

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### The duty holder

- ▶ Does the duty holder's conduct indicate a deliberate and/or repeated breach of workplace laws?
- ▶ What is the duty holder's attitude to cooperating with the FWO?
- ▶ Has the duty holder meaningfully engaged with the impacted parties, and their representatives, to explain and address allegations of non-compliance?
- ▶ What is the level of the duty holder's preparedness to rectify any wrongdoing?
- ▶ Are there outstanding allegations of non-compliance or concerns that the duty holder is non-compliant that have not been addressed?
- ▶ What is the likelihood of the duty holder remaining non-compliant or repeating the contraventions?
- ▶ What is the duty holder's ability to understand – and their access to resources that outline – their formal obligations?
- ▶ Are there indications of a significant power imbalance between the duty holder and workers?
- ▶ Has the duty holder demonstrated an ongoing willingness to continue engaging with us?
- ▶ Is the duty holder demonstrating a willingness to ensure any non-compliance is fully rectified, for example by working with an employer organisation or other reputable workplace relations advisor?

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### The context

- ▶ Is there a significant impact on a particular cohort of workers or community that warrants the FWO seeking the imposition of financial penalties?
  - ▶ Does the FWO need to ensure a strong deterrence message is conveyed to the public?
  - ▶ Has the impact occurred in one of our priority areas?
  - ▶ Is another regulator, employer organisation, union or other service provider already involved?
  - ▶ Would it be an effective and efficient use of FWO resources to assist those impacted to commence their own proceedings?
  - ▶ Is the proposed approach by the FWO an efficient and effective use of FWO resources?
  - ▶ What would be the impact if the FWO did not act in response to the concern?
  - ▶ What is the likelihood of reliable evidence being available, including witnesses prepared to 'go on the record'?
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## How we prioritise our resources

The FWO receives hundreds of thousands of requests for assistance each year and is responsible for regulating over one million businesses employing workers.

Our compliance and enforcement approach varies depending on specific circumstances and contexts. As part of prioritising matters, we use our discretion to assess the public interest and ensure our compliance and enforcement activities are an effective, ethical, economical and efficient use of public resources.

**The FWO treats all information and issues brought to our attention seriously.**

**The information contained in every allegation, report or request for assistance relating to issues of non-compliance is assessed.**

**The FWO uses the data and intelligence it receives to inform future compliance and enforcement actions.**

In deciding whether to allocate investigative resources, we consider whether allegations of non-compliance are:

- ▶ within or outside our jurisdiction
- ▶ being treated by other agencies, employer organisations, unions, advocates or other alternative services
- ▶ isolated events arising between the parties
- ▶ lacking in credible information, corroboration or other necessary evidence
- ▶ more appropriately resolved directly between the parties (for instance, where an attempt to resolve a dispute at the workplace level has not occurred).

**The FWO encourages parties to a workplace dispute to actively engage in its resolution. This includes checking their rights and obligations under the law or talking directly to relevant parties in the workplace.**

**We also connect parties to alternative services provided by unions, employer organisations, community legal centres and others to assist parties to resolve their dispute.**

**Where this is not appropriate, or is not successful, we are available to assist parties to resolve their issues via education or dispute-assistance services.**

## Deterrence, sustainability and system-wide effect

We prioritise our investigative resources to allegations of contraventions that are serious, significant and/or systemic in nature, or where it would otherwise serve the public interest.

We maintain the integrity of our enforcement tools, including by seeking compliance with orders of courts and tribunals. We reaffirm our enduring commitment to support vulnerable workers.

We consider the cause of non-compliance and how we can influence the behaviour of non-compliant parties by:

- ▶ maximising the deterrent effect<sup>17</sup> in industry sectors, geographic regions, supply chains and related businesses with a history of non-compliance
- ▶ clarifying and promoting a broad understanding of workplace laws, especially new provisions of the FW Act, to enhance ongoing compliance
- ▶ disrupting and then addressing system-wide non-compliant behaviours.

We publish information about our compliance activities and enforcement outcomes in accordance with our policies and procedures, supporting our commitment to accountability and transparency.



<sup>17</sup>Including the use of legal proceedings, see the Civil Litigation and Criminal underpayment offence sections

## Compliance and enforcement approach

The FWO uses the following regulatory model to determine its compliance and enforcement approach to allegations, evidence and suspected instances of non-compliance.

The model comprises the FWO's three main responses to allegations or instances of non-compliance and our commitment to:

1. encouraging voluntary compliance
2. guiding compliance where required
3. enforcing the law when it is in the public interest.



## Encouraging voluntary compliance



### Voluntary compliance

In response to requests for assistance involving a workplace dispute, we provide information, education and advice to support cooperation between the parties involved.

In the majority of cases, the FWO's response is to encourage voluntary compliance as part of our commitment to promoting productive, cooperative and harmonious workplaces.

Voluntary compliance is an effective, efficient and economical use of public resources, which is empowering and non-intrusive for the parties involved.

#### Advice and education

An important component of voluntary compliance is the provision of advice and education to assist parties who are involved in a workplace dispute to understand their rights and obligations.

Our advice and education functions help:

- ▶ raise awareness and understanding of the parties' rights and obligations under the FW Act through practical and helpful advice, information and education
- ▶ promote workplace-level engagement that encourages respectful dialogue and behaviour between all workplace parties and representatives
- ▶ build capabilities to sustain compliance.

#### Dispute assistance: requesting our assistance with a workplace dispute

Where parties request our assistance with a workplace dispute, we will provide them with advice, education, tools and resources to manage their dispute.

In most cases, our dispute-assistance services help parties successfully conclude disputes between themselves, and there is no ongoing need for our involvement.

Our phone-based dispute-assistance service provides tailored and practical advice to the parties in a workplace dispute on how to reach a resolution. Where parties are unable to resolve their dispute, or we believe that the best avenue to achieve a resolution is through a different process, we will provide options on alternative services available to resolve the dispute.

**The FWO may commence an investigation into allegations of non-compliance that have been considered by the dispute-assistance service.**

**A decision to allocate investigative resources will be made at the discretion of the FWO, based on a careful reassessment of the matter.**



## Guiding compliance where direction is required



### Guided compliance

Where warranted, the FWO may decide to take a guided compliance approach.

Such guidance typically follows Fair Work Inspectors having conducted an investigation (either in response to a request for assistance or initiated by information and intelligence the FWO has received), and then determining it is appropriate to formally direct duty holders, requiring them to undertake certain specified actions and demonstrate compliance with workplace laws.

The extent of the guidance provided by a Fair Work Inspector will depend on an assessment of available information and the conduct of duty holders. The most common form of guided compliance involves a Fair Work Inspector issuing a compliance notice. Another form of guidance is a Fair Work Inspector issuing a contravention letter detailing findings made in an investigation and requiring a set of actions to rectify the impact.

As failure to comply with these requirements can lead to court proceedings, the duty holder has the opportunity to respond by contesting the basis of the Fair Work Inspector's determination.

For more information on these and other tools, see the section Enforcement outcomes on page 11.

## Enforcing the law



The objective of civil litigation is to advance specific and/or general deterrence, including with respect to specific industry sectors and/or system-wide non-compliance.

There are some forms of conduct and duty holder behaviour that are considered as constituting more significant non-compliance and warranting a stronger enforcement approach.

Where an investigation by the FWO has determined there is sufficient evidence of such wrongdoing, we will consider commencing civil proceedings to seek financial penalties where it is in the public interest to do so. In matters of intentional conduct by duty holders relating to underpayments of employee entitlements, the FWO may also consider referring conduct to the Commonwealth Director of Public Prosecutions (CDPP) or Australian Federal Police (AFP) for potential criminal prosecution. See the section on 'Criminal offence – underpayments' on page 20.

While cases will vary, factors the FWO will take into account when considering whether to take stronger enforcement action, such as civil litigation, include the nature or impact of a duty holder's suspected non-compliant behaviour, or where the duty holder has not cooperated with an investigation. The FWO will also consider commencing civil proceedings where we believe it will help clarify workplace laws, especially new provisions of the FW Act or emerging significant issues, or to ensure the integrity of our enforcement tools.

Under the FW Act, the FWO may agree to accept an enforceable undertaking offered by a duty holder as an alternative to civil litigation or agree to enter into a cooperation agreement as an alternative to referring conduct to the CDPP or AFP. See the section Enforcement outcomes on page 11 and section on cooperation agreements on page 21.



## Compliance powers and enforcement outcomes

When the FWO decides to investigate or inquire into allegations of non-compliance, our Fair Work Inspectors can use statutory compliance powers for a 'compliance purpose', which includes determining whether a person is complying with the FW Act or a fair work instrument, or – in certain circumstances – whether a safety net contractual entitlement has been contravened.<sup>18</sup>

Where a provision of the *Fair Work Regulations 2009* (Cth) (FW Regulations) or another Act confers powers on Fair Work Inspectors, compliance powers can also be used for the purposes of that provision or Act.<sup>19</sup>

More information about our compliance powers is available at [Powers of Fair Work Inspectors](#).<sup>20</sup>

When, after investigating, we determine a breach of workplace laws has occurred, we will act proportionately to the significance of the breach and the impact (or potential impact) to the regulated community.

There are a range of outcomes that may occur because of, during, or in the process of finalising an investigation by a Fair Work Inspector.

### Findings letter

Where a Fair Work Inspector has completed an investigation, the FWO will notify relevant parties of the findings and outcome of that assessment. The notification may state that no contraventions were identified in relation to the specific investigation. In some instances, the notification may state that the Fair Work Inspector determined that there was insufficient evidence to sustain the finding that a contravention occurred but may caution or recommend a party take steps to ensure that they are compliant (for example, seeking independent legal or professional workplace advice). Where contraventions are identified, the Fair Work Inspector may issue a contravention letter (as set out below).

### Contravention letter – notification of failure to observe requirements<sup>21</sup>

If a Fair Work Inspector is satisfied that a person has failed to observe a requirement imposed by the FW Act, the FW Regulations or a fair work instrument, the Fair Work Inspector may issue a person with a written letter which:

- ▶ informs the person of the failure
- ▶ requires the person to take specified action (within a specified period) to rectify the failure
- ▶ requires the person to notify the Fair Work Inspector of any action taken to comply with the letter
- ▶ advises the person of the actions the Fair Work Inspector may take if the person fails to comply with the letter.

Depending on the nature of the contraventions and the person's response to the contravention letter, the FWO may decide to pursue one of the other available enforcement mechanisms.

<sup>18</sup> FW Act s.706(1)(a) & (b) and s.706(2)

<sup>19</sup> FW Act s.706(1)(c) & (d)

<sup>20</sup> <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/about-us/powers-of-fair-work-inspectors>

<sup>21</sup> FW Regulations reg. 5.05

## Compliance notice

Compliance notices are a non-punitive mechanism for the FWO to address alleged contraventions of the FW Act instead of commencing court proceedings.<sup>22</sup>

A Fair Work Inspector may issue a person with a compliance notice if the Inspector forms a reasonable belief that the person has contravened certain provisions of the FW Act or terms of instruments including:

- ▶ a provision of the National Employment Standards
- ▶ a term of a modern award
- ▶ a term of an enterprise agreement
- ▶ a term of a workplace determination
- ▶ a term of a national minimum wage order
- ▶ a term of an equal remuneration order
- ▶ an employer's obligations in relation to advertising rates of pay
- ▶ a term of a minimum standards order
- ▶ a term of a road transport contractual chain order.<sup>23</sup>

This may occur in parallel with other matters that are investigated and addressed using other enforcement mechanisms.

A compliance notice will require that the person take specified action to remedy the direct effects of the identified contraventions, including calculating and repaying any underpayments where relevant, and/or require the person to produce reasonable evidence of compliance.<sup>24</sup>

A person who complies with a compliance notice is not taken to have admitted the contraventions, or to have been found to have committed the contraventions.<sup>25</sup>

Where a person complies with a compliance notice, the FWO is unable to commence court proceedings against that person for the contraventions that are the subject of the compliance notice.<sup>26</sup>

A person may apply to the court to have a compliance notice reviewed on the basis that they have not committed a contravention set out in the compliance notice, or if the compliance notice does not comply with the necessary requirements under the FW Act.<sup>27</sup> The court may stay its operation as appropriate and confirm, cancel or vary the notice after reviewing it.

If a person fails to comply with the compliance notice and does not have a reasonable excuse,<sup>28</sup> that person has contravened the FW Act and a court may impose penalties of up to \$19,800 for an individual or \$99,000 for a body corporate that is a small business employer at the time of application to the court, or \$495,000 for a body corporate that is not a small business employer at the time of application.<sup>29</sup> It is open to the FWO to commence litigation for non-compliance with a compliance notice, as well as for any other contraventions identified – including the underlying contraventions referred to in the compliance notice.

<sup>22</sup>*Hindu Society of Victoria (Australia) Inc v FWO* [2016] FCCA 221 (*Hindu Society*) at [30] (per Judge Riethmuller). See also, *FWO v Darna Pty Ltd & Anor* [2015] FCCA 709 at [11] (per Judge Hartnett)

<sup>23</sup>FW Act s.716(1)

<sup>24</sup>FW Act s.716(2)

<sup>25</sup>FW Act s.716(4B)

<sup>26</sup>FW Act s.716(4A)

<sup>27</sup>FW Act s.717

<sup>28</sup>FW Act s.716(6)

<sup>29</sup>FW Act s.539: a failure to comply with s.716(5) can result in a maximum penalty equal to 60 penalty units. Pursuant to s.546 of the FW Act, a body corporate that is a small business employer (within the meaning of s 23 of the FW Act) at the time of application may face a pecuniary penalty of up to 5 times 60 penalty units (300 penalty units). A body corporate that is not a small business employer (within the meaning of s.23 of the FW Act) may face a pecuniary penalty of 5 times 300 penalty units, being 1,500 penalty units. A penalty unit is \$330 (as of 7 November 2024): Crimes Act s.4AA





## Infringement notice

If a Fair Work Inspector reasonably believes there has been one or more contraventions of the FW Act or the FW Regulations in relation to record-keeping, pay slip or job advertisement obligations, the Fair Work Inspector may issue an infringement notice.<sup>30</sup> The FWO regards record-keeping and pay slip obligations as the bedrock of compliance. Failure to comply with these obligations impedes:

- ▶ an employee's ability to assess whether their employer has complied with their obligations
- ▶ efficient resolution of a dispute between parties
- ▶ an investigation by a Fair Work Inspector.

An infringement notice requires the person to pay a penalty for committing the contravention.

The maximum penalties that a person can be required to pay under an infringement notice are:

- ▶ \$1,980 for an individual or \$9,900 for a body corporate for contraventions of the FW Act
- ▶ \$660 for an individual or \$3,300 for a body corporate for contraventions of the FW Regulations.<sup>31</sup>

An infringement notice can be issued up to 12 months after the contravention occurred.<sup>32</sup>

A person who complies with an infringement notice is not taken to have admitted to the contravention.<sup>33</sup>

Where a person complies with an infringement notice, the FWO is unable to commence court proceedings against that person for the particular contravention(s) that are the subject of the infringement notice.<sup>34</sup>

## Enforceable undertaking

If the FWO forms a reasonable belief that a person has contravened the FW Act, the FWO may accept a written undertaking from the person in relation to the contravention. While an enforceable undertaking is in place, it offers protection from the FWO commencing civil proceedings.

Enforceable undertakings<sup>35</sup> are a simple mechanism for the FWO to deal with contraventions of the FW Act while [t]he benefits to the recipients of the preparedness of the FWO to accept an undertaking is the avoidance of the considerable costs involved in court proceedings and the avoidance of the payment of a penalty.<sup>36</sup>

The FWO is more likely to accept an enforceable undertaking from a person (natural or corporate) where they have:

- ▶ limited or no history of non-compliance with the FW Act
- ▶ admitted contravening the FW Act
- ▶ fully cooperated and engaged with the FWO's investigation
- ▶ meaningfully engaged with the impacted parties, and their representatives, to explain and address allegations of non-compliance
- ▶ rectified the contravention(s), including remedying all underpayments to current and former employees impacted
- ▶ agreed to pay interest on those wage and superannuation entitlements owed
- ▶ apologised to those impacted, or committed to doing so
- ▶ established a hotline for those impacted to discuss their personal situation, or made reasonable attempts proportionate to the size of the business to facilitate a channel where those impacted can discuss their personal circumstances

<sup>30</sup> FW Regulations reg. 4.03 & 4.04

<sup>31</sup> FW Act s.558(2)

<sup>32</sup> FW Regulations reg. 4.04(2)

<sup>33</sup> FW Regulations reg. 4.09

<sup>34</sup> FW Regulations reg. 4.09

<sup>35</sup> FW Act s.715

<sup>36</sup> Hindu Society at [18] (per Judge Riethmuller)

- ▶ expressed some form of contrition for wrongdoing and agreed to demonstrate contrition through a payment either to the Consolidated Revenue Fund, or another entity whose objectives are strategically aligned with the FWO's statutory purpose and that is approved by the FWO in the circumstances<sup>37</sup>
- ▶ offered undertakings that are clear, reasonable, proportionate and enforceable
- ▶ provided letters of assurance of current compliance
- ▶ committed to taking specific steps to ensure future compliance by specific timeframes.

In line with the FWO's commitment to encouraging behavioural change and facilitating a sustainable culture of compliance, the FWO is also more likely to accept an undertaking from a person who is committed to:

- ▶ taking effective steps to better ensure future compliance, and implementing governance, management and accountability measures to support improved compliance
- ▶ investing in the workplace relations capability development of management responsible for relevant compliance
- ▶ implementation of policies and processes that ensure compliance
- ▶ acting on dedicated workplace relations advice from employer organisations, lawyers, or other appropriate workplace relations professionals or advisors
- ▶ ongoing audits. For instance, annual audits conducted either by in-house or independent experts (including the auditor having direct contact with a sample of employees to ensure accuracy of hours worked, validation of duty holder assertions, and other appropriate measures)
- ▶ facilitating worker voice mechanisms through the creation of worker representative forums that socialise and monitor compliance issues
- ▶ the provision of worker-friendly, dispute-resolution mechanisms.

To advance transparency and accountability, the FWO's practice is to publish the executed enforceable undertaking on our website as well as issue an associated media statement to enhance general deterrence.

To embed behavioural change, enforceable undertakings are typically 2 to 3 years in length. The FWO has a dedicated monitoring team that actively works with all persons that have executed an enforceable undertaking by providing a dedicated FWO relationship manager who offers tailored assistance to ensure they meet their undertakings for the duration of the instrument.

The FWO reserves its right to issue media statements at any time during the term of the enforceable undertaking if the FWO considers it reasonable and appropriate, noting the FWO cannot commence civil proceedings against the person for contraventions about which they have given the enforceable undertaking.<sup>38</sup> However, if a person fails to comply with any of the terms of the enforceable undertaking, the FWO may commence civil proceedings in court to seek orders directing the person to comply, for compensation, or for any other appropriate order.<sup>39</sup>

If the FWO accepts an enforceable undertaking, other persons who can bring proceedings under the FW Act in relation to the same conduct may still take civil action. This includes an affected employee or a union.

<sup>37</sup>Decisions about the necessity for and/or the quantum of a contrition payment, as well as whether another entity may be appropriate to receive the payment instead of the Consolidated Revenue Fund, are made on a case-by-case basis. The FWO considers several factors, including the nature and extent of the contraventions, rectification of underpayments, other remedial steps taken, and proportionality to any penalties that a court may impose if the matter were litigated with admitted contraventions.

<sup>38</sup>FW Act s.715(4)

<sup>39</sup>FW Act s.715(6)&(7)



## Civil litigation

Commencing civil proceedings, which we refer to as 'litigation,' is another enforcement mechanism available to the FWO. It is generally reserved for those contraventions that are serious, significant and/or systemic in nature, or otherwise in circumstances where litigation would uphold the integrity of our enforcement tools or serve the public interest.

Litigation is an essential enforcement mechanism for 3 reasons:

1. enforcing the law and obtaining court orders sends a powerful public message to others not to engage in similar conduct (general deterrence)
2. stopping and deterring people from engaging in unlawful behaviour (specific deterrence)
3. clarifying the law helps the workplace community understand the various obligations and rights arising from Commonwealth workplace laws.

The FWO is more likely to litigate in cases involving:

- ▶ deliberate and/or repeated non-compliance with Commonwealth workplace laws
- ▶ exploitation of vulnerable workers
- ▶ failure to cooperate with the FWO and fix contraventions after being given the opportunity to do so and without a reasonable excuse
- ▶ parties who have a prior history of contraventions who have not taken adequate steps to ensure compliance despite being advised of the consequences in the past.

Even in circumstances in which contraventions have been rectified, it may still be appropriate for the FWO to commence civil proceedings (for example, to obtain a penalty in respect of a contravention to achieve specific or general deterrence).

In addition to the FWO commencing its own proceedings,<sup>40</sup> section 682(1)(f) of the FW Act provides that the FWO may represent employees or outworkers who are, or may become, a party to proceedings in a court or the Fair Work Commission (if the FWO considers that the representation will promote compliance with the FW Act or fair work instrument). The FWO may also refer relevant alleged criminal offences to the CDPP or the AFP.

## Who we litigate against

Liability for contraventions of Commonwealth workplace laws may lie with more than just one person or body. Sections 550 and 557A(5A) of the FW Act describe how a person can be 'involved in' a contravention, and states that such persons are treated as having committed a contravention themselves.

We may commence civil proceedings and seek orders against any person who contravenes their obligations under Commonwealth workplace laws, as well as those who are 'involved' in such contraventions. This may include:

- ▶ employers
- ▶ registered organisations
- ▶ company directors or company secretaries
- ▶ officials of organisations
- ▶ human resources managers or other managers
- ▶ external agents or advisors, such as accountants, bookkeepers or external human resources consultants
- ▶ companies and people involved in supply chains involving the procurement of labour
- ▶ a holding company of a subsidiary employing entity or its directors
- ▶ a franchisor.

<sup>40</sup> FW Act s.682(1)(d)

## When does the FWO commence civil litigation?

The FWO will only commence civil proceedings if it considers that there is sufficient evidence to do so, and it would be in the public interest.

In deciding whether to institute any appeal, the FWO will consider whether there are reasonable prospects of success and whether the appeal is in the public interest.

As a regulator utilising public funds, the FWO will consider the impact on its resources and costs before making a decision to commence civil proceedings or an appeal.

The public interest factors the FWO considers in determining to commence (or not commence) litigation varies depending on the particular circumstances of each case. The following table sets out some of the matters the FWO typically considers.

Public interest factors	Examples of matters the FWO considers
<b>Nature, seriousness and circumstances of the alleged contraventions</b>	<ul style="list-style-type: none"> <li>▶ seriousness of the alleged contraventions</li> <li>▶ prevalence in the community of the type of behaviour</li> <li>▶ any mitigating or aggravating circumstances</li> <li>▶ whether the person(s) alleged to have committed the contraventions sought and relied on expert or professional advice</li> <li>▶ evidence of deliberate or reckless conduct including omitting to take steps to ensure compliance</li> <li>▶ whether contraventions have been admitted and/or fixed or are being fixed.</li> </ul>
<b>Characteristics of person(s) alleged to have committed the contraventions</b>	<ul style="list-style-type: none"> <li>▶ compliance history</li> <li>▶ sophistication and financial position (including the impact on business viability, service delivery and employees if excessive costs and sanction imposed)</li> <li>▶ whether the person has actively assisted with the FWO's inquiries, and whether they genuinely accept their non-compliance</li> <li>▶ steps taken to prevent further contraventions.</li> </ul>
<b>Characteristics of person(s) affected by the alleged contraventions</b>	<ul style="list-style-type: none"> <li>▶ any vulnerabilities, such as whether the person has a disability, is a young or mature worker, is present in Australia on a visa, or is from a culturally and linguistically diverse background</li> <li>▶ whether the person has the ability and resources to commence their own proceedings.</li> </ul>
<b>Impact of the alleged contraventions</b>	<ul style="list-style-type: none"> <li>▶ direct and indirect impact on the people who have been affected by the alleged contraventions</li> <li>▶ impact on any other person(s), including other businesses/competitors</li> <li>▶ the impact of the alleged contraventions and their size, such as the number of people affected or the quantum of any underpayments.</li> </ul>
<b>Impact of litigation on general and specific deterrence</b>	<ul style="list-style-type: none"> <li>▶ whether litigation will reduce the likelihood that others will engage in similar behaviour (general deterrence)</li> <li>▶ whether litigation will reduce the likelihood of further contraventions of workplace laws by the person(s) involved in the proceedings (specific deterrence).</li> </ul>
<b>Effect of litigation</b>	<ul style="list-style-type: none"> <li>▶ suitability, efficacy and availability of other enforcement mechanisms as an alternative to litigation</li> <li>▶ likely outcome in the event the contraventions are found to have occurred (for example, penalties, compensation or other orders)</li> <li>▶ whether the likely outcome would be unduly harsh or oppressive.</li> </ul>
<b>Administration of justice / integrity of the system</b>	<ul style="list-style-type: none"> <li>▶ passage of time since the alleged contraventions</li> <li>▶ likely length and cost of litigation</li> <li>▶ whether proceedings are necessary to maintain public confidence in the administration of workplace laws, including our enforcement tools.</li> </ul>

The FWO's decision to commence or not commence civil proceedings must be made impartially and must not be influenced by any inappropriate consideration including race, religion, age, sex, intersex status, gender identity, sexual orientation, national origin or political association. The decision must not be influenced by any political advantage or disadvantage to the government, any political group or party or any union, industrial or employer group or association.



## Conduct of civil proceedings

The FWO will conduct litigation honestly, fairly, consistently and in accordance with the Commonwealth's obligation to act as a model litigant.<sup>41</sup>

The FWO will make decisions about the conduct of litigation based on the available evidence. If another party asks the FWO to agree to a particular course, or to put a submission to the court, we may ask them to provide us with evidence to support their request.

Where evidence discloses multiple potential contraventions of Commonwealth workplace laws, the FWO will take care to plead the contraventions that adequately reflect the nature and extent of the relevant behaviour. Where the FWO alleges there have been serious contraventions within the meaning of section 557A of the FW Act, we will specify the relevant serious contraventions.

A breach will only be a serious contravention where a person knowingly contravened the relevant provision or was reckless as to whether the contravention would occur.

After civil proceedings have been commenced, the FWO participates in discussions to limit any issues in dispute, for example, during court mediations. As a regulator, the FWO approaches such discussions from a public interest perspective. In circumstances where a party provides new evidence alleging that the contravention(s) did not occur, the FWO will consider the evidence and may:

- ▶ proceed with the original contraventions
- ▶ proceed in relation to fewer contraventions than originally identified
- ▶ accept admissions only in relation to some contraventions and not press or seek orders in relation to other contraventions. All admissions must reflect a genuine acceptance of responsibility.

We will discontinue civil proceedings if it is appropriate to do so. It is unusual for us to make a decision to discontinue given the detailed assessment we undertake before we commence civil proceedings. However, we may take this

action in appropriate circumstances noting that our case assessment process is ongoing, including throughout the course of civil proceedings.

Admissions or payments made just before or after civil proceedings are commenced will usually not justify discontinuing the proceedings, but the FWO will take such action into account when seeking orders and making submissions to the court on appropriate penalties.

## Orders and penalties

The FW Act allows eligible courts to make a wide range of orders if a person is found to have contravened the FW Act. Orders that the FWO may seek in civil proceedings include orders:

- ▶ that underpayments be rectified, and interest be paid
- ▶ that compensation be paid to person(s) affected by the contraventions. Such compensation would be paid by person(s) responsible for contraventions and/or other persons who were 'involved' in them
- ▶ for a civil penalty to be paid to the Commonwealth<sup>42</sup> or, where appropriate, the penalty be redirected to an impacted party
- ▶ that a person pay any civil penalty personally, without seeking or accepting indemnity from a third party
- ▶ for injunctions to stop, prevent or restrain further contraventions from occurring
- ▶ that a person take specific steps, for example by undertaking training or conducting wage audits.

<sup>41</sup>Appendix B to the Legal Services Directions 2017

<sup>42</sup>The maximum penalties for serious contraventions, within the meaning of s.557A of the FW Act, are higher than for other contraventions of the FW Act



## Submissions on penalty

The courts are responsible for deciding what orders are appropriate in a case and the amount of any civil penalty. Courts may have regard to submissions made by the parties to proceedings in relation to penalty, including as to what facts are relevant.<sup>43</sup> The FWO may put evidence before the court to support our submissions on penalty, including evidence about non-compliance in particular industries, places or amongst particular groups of workplace participants.

The FWO will seek penalties that:

- ▶ will achieve general and specific deterrence
- ▶ avoid a harsh or oppressive outcome.

In appropriate cases, we may reach agreement with other parties about the amount of penalty we propose to the court. The court may accept the agreed penalty if it is satisfied that the amount is appropriate.<sup>44</sup>

## Discounts on penalty

Courts may reduce the penalty to be ordered if a person admits the contraventions and cooperates with the court process.<sup>45</sup> We will draw the court's attention to any conduct that justifies a discount on penalty, in particular any admissions made early during an investigation or soon after the commencement of civil proceedings. If admissions are made close to – or during – the court hearing, we may submit to the court that a lesser or no discount on penalty is appropriate.

## Costs

Under the FW Act, parties to litigation will normally pay their own costs of the proceeding. However, the court can order a party to pay someone else's costs in some circumstances, such as when a party has acted unreasonably.<sup>46</sup> In appropriate cases, the FWO may seek orders that a party pay costs.

## Enforcement of Court orders

Court orders must be complied with by the relevant party on or before the date set out in the order. The FWO will take enforcement action to ensure compliance with Court orders pursuant to our obligations under the *Public Governance, Performance and Accountability Act 2013* (Cth) and *Public Governance, Performance and Accountability Rule 2014* (Cth).

<sup>43</sup>*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 (*Commonwealth v FWBII*) at [46]-[64] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ)

<sup>44</sup>*Commonwealth v FWBII* at [48], [57]-[59] (per French CJ, Kiefel, Bell, Nettle and Gordon JJ)

<sup>45</sup>*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [74]-[76] (per Stone and Buchanan JJ)

<sup>46</sup>FW Act s 570

## Approach to self-reported unintentional non-compliance

The FWO takes a practical and proportionate approach to self-reported non-compliance.

Isolated, unintentional payroll errors resulting in underpayments over a short period of time (up to 12 months) do not need to be actively reported to the FWO, as long as:

- ▶ employees are appropriately informed of the underpayment
- ▶ employees are back paid in full as soon as practicable
- ▶ changes are implemented to ensure the error does not happen again.

For broader and/or historical unintentional non-compliance, it is best to notify the FWO as soon as possible. Reports should be made via email to [corporateassurance@fwo.gov.au](mailto:corporateassurance@fwo.gov.au). For the self-reporting of intentional conduct, see the section on 'Cooperation agreements' on page 21.

Any self-reports should identify the following, to the extent that the information is known at the time of reporting:

- ▶ details of the non-compliance
- ▶ what led to or contributed to it
- ▶ the action taken to assess and rectify it (including back-payments and interest)
- ▶ details of corrective measures being implemented to prevent further non-compliance (including enhancements to governance arrangements, systems or process change and management training)
- ▶ confirmation of notification to the Australian Tax Office (ATO) (if there will be likely tax and superannuation implications). Notifications to the ATO can be made via email to [employerobligationsworkinggroup@ato.gov.au](mailto:employerobligationsworkinggroup@ato.gov.au)
- ▶ confirmation of notification to any other third parties such as a union.

Our general approach is to work collaboratively with duty holders who self-report and cooperate with us to ensure the integrity of their remediation. For more complex self-reports, the FWO's Payroll Remediation Program Guide provides a suggested framework for conducting a large-scale worker-centred remediation program. It also outlines the FWO's approach to assessing compliance.

The FWO considers the cost of remedying the contraventions should rest with the duty holder (and not the taxpayer). Accordingly, subject to the nature and scale of the contraventions and the extent of cooperation shown to the FWO, the FWO's approach will typically either be one of voluntary compliance or guided compliance as described above.

Where more significant unintentional contraventions or conduct are involved (for example, large-scale underpayments going back many years, or breaches of undertakings given to the Fair Work Commission in securing an enterprise agreement approval), the FWO may accept an enforceable undertaking offered by a duty holder (at the commencement, during, or at the end of an investigation) with terms reflecting the scale of the underpayment, the employer's cooperative response to rectify harms and commitment to sustainable compliance.





# Criminal underpayment offence

From 1 January 2025 it is a criminal offence for an employer to intentionally engage in conduct that results in a failure to pay certain employee entitlements.<sup>47</sup>

An employer will commit an offence under section 327A of the FW Act if they:

- ▶ are required to pay an amount to an employee (such as wages), or an amount on behalf of or for the benefit of an employee (such as superannuation), under the FW Act, a fair work instrument or a transitional instrument (being a 'required amount'), and
- ▶ intentionally engage in conduct (by doing or not doing something) that intentionally results in a failure to pay that required amount in full on or before the day the amount is due for payment.

The criminal underpayment offence does not cover certain types of entitlements for some employees. For more information about these exceptions, see our website.<sup>48</sup>

In addition to employers, other persons (natural or corporate) can also be prosecuted under 'related offence provisions' for their conduct in the following ways:

- ▶ attempting to commit the criminal underpayment offence
- ▶ aiding, abetting, counselling or procuring the commission of the criminal underpayment offence by another person
- ▶ inciting (i.e. urging) the commission of the criminal underpayment offence
- ▶ entering into an agreement with two or more persons to commit the criminal underpayment offence (a 'related offence').<sup>49</sup>

## When does the FWO refer conduct for criminal prosecution?

The FWO will be responsible for conducting investigations of the criminal underpayment offence and related offence, but only the CDPP or AFP may commence proceedings.<sup>50</sup> Conduct will only be referred to the CDPP or AFP if we consider that we have gathered sufficient evidence to prove that a criminal underpayment offence or related offence has been committed. Generally, conduct will be referred to the CDPP. Conduct may be referred to the AFP where we consider that the matter requires further investigative assistance.

In determining whether to refer conduct to the CDPP, the FWO will consider the public interest factors referred to above in the section 'When does the FWO commence civil litigation?' on page 16. Referrals will generally be reserved for the most serious conduct, including where there is a greater need for specific or general deterrence than civil litigation. Unlike civil litigation, the FWO will not refer a matter to the CDPP solely for the purpose of clarifying the law (e.g. the interpretation of an entitlement in a fair work instrument).

The FWO recognises that not all conduct potentially amounting to a criminal underpayment offence or a related offence must result in a referral to the CDPP. The FWO will consider entering into a cooperation agreement with a person that has reported conduct to us, has positively engaged with us and agrees to enable the remedying of the effects of their conduct. See the section on 'Cooperation agreements' on page 21.

The FWO may also consider whether a small business employer has complied with the Voluntary Small Business Wage Compliance Code prior to referring conduct to the CDPP. See the section on the 'Voluntary Small Business Wage Compliance Code' on page 22.

<sup>47</sup>See a guide to cooperation agreements for a further explanation of the criminal underpayment offence and related offence, including the employers, employees and entitlements that the offences apply to <https://www.fairwork.gov.au/cooperation-agreements>

<sup>48</sup><https://www.fairwork.gov.au/criminal>

<sup>49</sup>Section 12 (definition of 'related offence provision') of the FW Act. See further section 6 of the *Crimes Act 1914* (Cth) and Part 2.4 of the *Criminal Code 1995* (Cth)

<sup>50</sup>FW Act s.327C

## Conduct of proceedings

If a matter is referred to the CDPP, the CDPP determines whether the evidence is sufficient to commence criminal proceedings and whether prosecution is in the public interest in accordance with the Prosecution Policy of the Commonwealth.<sup>51</sup> If criminal proceedings are commenced, the case is then prosecuted by the CDPP.

## Penalties

The consequences of a criminal conviction are generally more significant than in civil litigation.

The maximum penalties for committing each criminal underpayment offence or related offence are:

- ▶ for individuals: a term of imprisonment not more than 10 years and/or:
  - if the underpayment amount can be calculated: the greater of 3 times the underpayment amount and \$1.65 million.
- ▶ for corporate or commonwealth entities:
  - if the underpayment amount can be calculated: the greater of 3 times the underpayment amount and \$8.25 million; or
  - if the underpayment amount cannot be calculated: \$8.25 million.

## Cooperation agreements

Cooperation agreements provide a person with the opportunity to access protections from potential criminal prosecution if they have engaged in conduct that amounts to a potential offence or related offence. The FWO will decide whether to enter into a cooperation agreement. When deciding whether to enter into a cooperation agreement, the FWO will consider the following matters:

- ▶ whether in the FWO's view the person has made a voluntary, frank and complete disclosure of the conduct
- ▶ the nature and level of detail of the disclosure in relation to the conduct
- ▶ whether in the FWO's view the person has cooperated with the FWO in relation to the conduct
- ▶ the FWO's assessment of the person's commitment to continued cooperation in relation to the conduct, including by way of providing the FWO with comprehensive information to enable the effectiveness of the person's actions and approach to remedying the effects of the conduct to be assessed
- ▶ the nature and gravity of the conduct
- ▶ the circumstances in which the conduct occurred; and
- ▶ the person's history of compliance with the FW Act.

Where appropriate, the FWO will also consider whether the person has meaningfully engaged with the impacted parties, and their representatives, to explain and address the conduct.

A cooperation agreement is a written agreement between the FWO and a person (i.e., an individual, corporate entity or Commonwealth agency). The agreement covers conduct engaged in by the person that amounts to a potential criminal underpayment offence or related offence, with the conduct specified in the agreement. A cooperation agreement may also include terms that require the person to take positive steps to enable the remedying of the effects of their conduct and ensure future compliance.

<sup>51</sup> <https://www.cdpp.gov.au/prosecution-policy>

Cooperation agreements:

- ▶ promote positive engagement and cooperation with the FWO
- ▶ address intentional underpayments without the need for a criminal prosecution
- ▶ in appropriate circumstances, provide the FWO with information that can be used to investigate other persons who may have committed a criminal underpayment offence or a related offence and who have not cooperated with the FWO to address the conduct.

While a cooperation agreement is in force between the FWO and a person, the FWO cannot refer conduct that is the subject of the agreement to the CDPP or AFP for possible prosecution.<sup>52</sup>

If a person enters into a cooperation agreement, they may still face civil action by persons who can bring proceedings under the FW Act in relation to the same conduct. This includes the FWO, an affected employee, or a union.

See 'A guide to cooperation agreements'<sup>53</sup> for further information on:

- ▶ the criminal underpayment offence and related offences
- ▶ what cooperation agreements are and their benefits
- ▶ when and how to engage with the FWO to receive protection from criminal prosecution
- ▶ what the FWO will consider in deciding whether to enter into a cooperation agreement
- ▶ the standard terms of cooperation agreements
- ▶ the potential consequences of failing to comply with a cooperation agreement
- ▶ the role of the CDPP.

## Voluntary Small Business Wage Compliance Code

The Voluntary Small Business Wage Compliance Code (the Code) is a legislative instrument declared by the Minister under the FW Act. Its purpose is to give small business employers (those with less than 15 employees) comfort that the FWO will not refer them for possible criminal prosecution if they did not intentionally underpay their employees. If the FWO is satisfied that the small business employer has complied with the Code, we cannot refer the relevant conduct to the CDPP or AFP for possible prosecution.

Where the FWO makes a decision about whether or not a small business employer has complied with the Code, we will notify the employer of our decision in writing.

Small business employers can refer to the FWO's Guide to paying employees correctly and the Code<sup>54</sup> for further information on:

- ▶ the criminal underpayment offence
- ▶ understanding the consequences of underpaying employees
- ▶ finding out about the Code and how to access it
- ▶ confirming employees are being paid correctly
- ▶ remaining compliant on wages
- ▶ taking appropriate action to fix issues once they are identified.

<sup>52</sup> Section 717A(1) of the FW Act

<sup>53</sup> <https://www.fairwork.gov.au/cooperation-agreements>

<sup>54</sup> <https://www.fairwork.gov.au/vsbwcc>



## Feedback

The FWO is committed to improving our services. We encourage feedback about your experience with us and invite people to contact us via [our website](#).<sup>55</sup>

Feedback and complaints provide valuable information we can use to improve future customer experiences and satisfaction and helps us know what we're doing well and what changes we need to make.

Feedback and complaints about the services offered by the FWO are reviewed and managed by a dedicated team within the FWO. Acting independently, the team reviews the matters raised and determines whether and what type of action is required to respond to service complaints.

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 [Commonwealth Ombudsman](#).<sup>56</sup>

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<sup>55</sup> <https://www.fairwork.gov.au/feedback>

<sup>56</sup> <https://www.ombudsman.gov.au/>





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